FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. Original.

STATE OF ALABAMA, *Plaintiff,*

v.

STATE OF ARIZONA, ET AL., *Defendants.*

In Equity.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT, AND BILL OF COMPLAINT

THE PARAGON PRESS, MONTGOMERY

INDEX

	Page
Notice of Motions	1
Proof of Mailing Notice, Copies of Motion and Bill of Complaint	5
Motion for Leave to File Bill of Complaint	8
Bill of Complaint	9
Appendix A	29
Appendix B	77

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. Original.

STATE OF ALABAMA, *Plaintiff,* v. STATE OF ARIZONA, ET AL., *Defendants.*	*In Equity.*

NOTICE OF MOTIONS.

To:

Hon. B. B. Mouer, Governor,
Hon. Arthur T. LaPrade, Attorney General,
Phoenix, Arizona.

Hon. James Rolph, Jr., Governor,
Hon. U. S. Webb, Attorney General,
Sacramento, California.

Notice of Motions.

Hon. Edward C. Johnson, Governor,
Hon. Clarence L. Ireland, Attorney General,
Denver, Colorado.

Hon. C. Ben Ross, Governor,
Hon. Fred J. Babcock, Attorney General,
Boise, Idaho.

Hon. Paul V. McNutt, Governor,
Hon. Philip Lutz, Jr., Attorney General,
Indianapolis, Indiana.

Hon. Clyde L. Herring, Governor,
Hon. John Fletcher, Attorney General,
Des Moines, Iowa.

Hon. Ruby Laffoon, Governor,
Hon. Bailey P. Wootton, Attorney General,
Frankfort, Kentucky.

Hon. William A. Comstock, Governor,
Hon. Paul W. Voorhies, Attorney General,
Lansing, Michigan.

Hon. Floyd B. Olson, Governor,
Hon. Harry H. Peterson, Attorney General,
St. Paul, Minnesota.

Hon. J. E. Erickson, Governor,
Hon. Raymond T. Nagle, Attorney General,
Helena, Montana.

Notice of Motions.

Hon. A. Harry Moore, Governor,
Hon. William A. Stevens, Attorney General,
Newark, New Jersey.

Hon. Herbert H. Lehman, Governor,
Hon. John J. Bennett, Jr., Attorney General,
Albany, New York.

Hon. J. C. B. Ehringhaus, Governor,
Hon. Dennis G. Brummitt, Attorney General,
Raleigh, North Carolina.

Hon. George White, Governor,
Hon. John W. Bricker, Attorney General,
Columbus, Ohio.

Hon. William H. Murray, Governor,
Hon. J. Berry King, Attorney General,
Oklahoma City, Oklahoma.

Hon. Julius L. Meier, Governor,
Hon. I. H. Van Winkle, Attorney General,
Salem, Oregon.

Hon. Gifford Pinchot, Governor,
Hon. William A. Schnader, Attorney General,
Harrisburg, Pennsylvania.

Hon. Clarence D. Martin, Governor,
Hon. G. W. Hamilton, Attorney General,
Seattle, Washington.

Notice of Motions.

Hon. A. G. Schmedeman, Governor,
Hon. James E. Finnegan, Attorney General,
Madison, Wisconsin.

SIRS:

Please be advised that on Monday, May 8, 1933, the plaintiff will apply to the Court for leave to file its bill of complaint, a true copy of which is annexed hereto.

At the same time and place the plaintiff will apply to the Court for an order setting a day for hearing the prayer of the bill of complaint for a preliminary injunction.

Respectfully,
THOMAS E. KNIGHT, Jr.,
Attorney General

WM. LOGAN MARTIN,
Counsel

Dated: May 8, 1933.

Proof of Mailing.

PROOF OF MAILING NOTICE, COPIES OF MOTION AND BILL OF COMPLAINT

STATE OF ALABAMA,
COUNTY OF MONTGOMERY

Before the undersigned authority personally appeared Lola T. Dees, who, being first duly sworn, deposes and says that on May 8, 1933, she deposited in the United States Post Office in the City of Montgomery, Alabama, in a sealed envelope, with postage prepaid, by registered mail, a true printed copy of the foregoing notice and the annexed motion and bill of complaint, addressed to each of the following persons:

Hon. B. B. Mouer, Governor,
Hon. Arthur T. LaPrade, Attorney General,
Phoenix, Arizona.

Hon. James Rolph, Jr., Governor,
Hon. U. S. Webb, Attorney General,
Sacramento, California.

Hon. Edward C. Johnson, Governor,
Hon. Clarence L. Ireland, Attorney General,
Denver, Colorado.

Hon. C. Ben Ross, Governor,
Hon. Fred J. Babcock, Attorney General,
Boise, Idaho.

Proof of Mailing.

Hon. Paul V. McNutt, Governor,
Hon. Philip Lutz, Jr., Attorney General,
Indianapolis, Indiana.

Hon. Clyde L. Herring, Governor,
Hon. John Fletcher, Attorney General,
Des Moines, Iowa.

Hon. Ruby Laffoon, Governor,
Hon. Bailey P. Wootton, Attorney General,
Frankfort, Kentucky.

Hon. William A. Comstock, Governor,
Hon. Paul W. Voorhies, Attorney General,
Lansing, Michigan.

Hon. Floyd B. Olson, Governor,
Hon. Harry H. Peterson, Attorney General,
St. Paul, Minnesota.

Hon. J. E. Erickson, Governor,
Hon. Raymond T. Nagle, Attorney General,
Helena, Montana.

Hon. A. Harry Moore, Governor,
Hon. William A. Stevens, Attorney General,
Newark, New Jersey.

Hon. Herbert H. Lehman, Governor,
Hon. John J. Bennett, Jr., Attorney General,
Albany, New York.

Proof of Mailing.

Hon. J. C. B. Ehringhaus, Governor,
Hon. Dennis G. Brummitt, Attorney General,
Raleigh, North Carolina.

Hon. George White, Governor,
Hon. John W. Bricker, Attorney General,
Columbus, Ohio.

Hon. William H. Murray, Governor,
Hon. J. Berry King, Attorney General,
Oklahoma City, Oklahoma.

Hon. Julius L. Meier, Governor,
Hon. I. H. Van Winkle, Attorney General,
Salem, Oregon.

Hon. Gifford Pinchot, Governor,
Hon. William A. Schnader, Attorney General,
Harrisburg, Pennsylvania.

Hon. Clarence D. Martin, Governor,
Hon. G. W. Hamilton, Attorney General,
Seattle, Washington.

Hon. A. G. Schmedeman, Governor,
Hon. James E. Finnegan, Attorney General,
Madison, Wisconsin.

LOLA T. DEES.

Sworn to and subscribed before me, this May 3, 1938.

A. HEUSTESS,
Notary Public.

Motion for Leave to File Bill of Complaint.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Comes the State of Alabama by its Attorney General, and asks leave of the Court to file its bill of complaint, submitted herewith.

Plaintiff also applies to the Court for an order setting a day for hearing the prayer of the bill of complaint for a preliminary injunction.

THOMAS E. KNIGHT, Jr.,
Attorney General.

WM. LOGAN MARTIN,
Counsel.

Dated: May 3, 1933.

IN THE

Supreme Court of the United States

IN EQUITY

No. Original.

October Term, 1932.

THE STATE OF ALABAMA,

Plaintiff,

V.

THE STATES OF ARIZONA, CALIFORNIA, COLORADO, IDAHO, INDIANA, IOWA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, WASHINGTON AND WISCONSIN,

Defendants.

BILL OF COMPLAINT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Bill of Complaint.

The State of Alabama brings this its bill of complaint against the States of Arizona, California, Colorado, Idaho, Indiana, Iowa, Kentucky, Michigan, Minnesota, Montana, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Washington and Wisconsin, and says:

1. The plaintiff is the State of Alabama, one of the states of the United States of America.

2. The defendants are the States of Arizona, California, Colorado, Idaho, Indiana, Iowa, Kentucky, Michigan, Minnesota, Montana, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Washington and Wisconsin, all being states of the United States of America.

3. The plaintiff brings this suit for the protection of its rights and powers as a sovereign state.

4. The purpose of this suit is to have declared unconstitutional certain laws of the defendant states and an act of the Congress of the United States, all of which violate the Commerce Clause of, and the latter violates the Tenth Amendment to, the Constitution of the United States, as a result of the operation of which the plaintiff has suffered and will continue to suffer great and irreparable financial loss and a diminution of its sovereign powers of government.

Bill of Complaint.

5. (a) The plaintiff in the exercise of its powers of government and as a result of the violation of its criminal laws had in its several penal institutions during 1932 a total of 7,491 prisoners. As a result of the extension of pardons and paroles by proper authority this population was reduced to a daily average of 5,515. Of this number 2,762 were confined in the plaintiff's Kilby, Speigner and Wetumpka Prisons, and of these 418 were employed in a cotton mill, and 449 in a shirt factory, at Kilby Prison, and 894 in a cotton mill at Speigner Prison. 258 were employed in an underwear factory at Wetumpka until August 1, 1932.

(b) At the Atmore Prison Farm consisting of 8,860 acres and devoted exclusively to agriculture, approximately 600 prisoners were employed. The remaining prison population at Atmore and at Kilby, Speigner and Wetumpka, except the aged, infirm and ill in hospital, were assigned to duties as cooks, cell cleaners, sweepers, hospital stewards and prison attendants; or in dairy work or gardening, or were engaged in machine shops, or in local highway maintenance on their prison grounds.

(c) At Prison Number Four, consisting of 2,868 acres of land and devoted exclusively to agriculture, approximately 450 prisoners were employed in activities similar to those engaged in at Atmore Prison Farm.

(d) Of the remaining average daily prison popula-

tion, 1,241 were employed in road camps conducted in connection with road building and maintenance.

6. The foregoing daily average of activities and employments while covering the year 1932, may be accepted as applicable to the year 1933 up to the time of filing this bill, with the exception of Wetumpka Prison, the activities of this prison having been terminated and the building in which the same were conducted having been demolished during the latter part of 1932, the prisoners engaged therein being distributed among other prisons in the state.

7. The plaintiff for the purpose of providing employment for its prison population has from time to time made considerable capital investment, consisting in the main of (a) 18,285 acres of land, 13,101 acres of which are in cultivation, (1) 5,000 acres of which produce a crop of 2,500 bales of cotton, (2) 800 acres of which produce a potato crop of 150,000 bushels, and (3) 8,301 acres being tilled with prison labor provide a considerable part of the food and supplies for the inmates of the penal institutions herein referred to and feedstuffs for plaintiff's livestock; (b) a cotton mill and shirt factory at Kilby Prison, including machinery and equipment with a capacity of 12,450 spindles; and (c) a cotton mill at Speigner Prison, including machinery and equipment with a capacity of 9,664 spindles.

8. On June 1, 1927, plaintiff executed with East Coast Manufacturing Company, a corporation of Delaware, an agreement (herein called the agreement) for the purchase by the latter of chambray (goods made from cotton) manufactured at Kilby and Speigner cotton mills and for the furnishing by the plaintiff of prison labor for the manufacture of work shirts, the agreement expiring on March 31, 1933. East Coast Manufacturing Company assigned its interest in the agreement and during the term thereof, to Gordon East Coast Company, which assumed the performance of the terms thereof.

The agreement contained a provision under the terms of which between the first and tenth days of March, June, September and December of each year, the parties thereto were to agree upon the fair market prices to be paid for the ensuing period of three months; or by common agreement for a six-month period as set out. The East Coast Manufacturing Company (herein called the company, which will also designate Gordon East Coast Company as successor) provided the necessary equipment for manufacturing work shirts out of the chambray made by the plaintiff sufficient to furnish employment to not less than 400 nor more than 500 persons in the making of such shirts, and in operating the cutting tables and the machinery and appliances provided by the company in the making of such work shirts; the agreement providing also for proper handling, folding, pressing, checking, etc.

The agreement further provided that the plaintiff should furnish all the necessary light, heat and power and that the prisoners should at all times be under the entire management and control of the plaintiff. It was the duty of the company to furnish supervision and instruction for the purpose of teaching and instructing the prisoners in the proper manufacture of such work shirts; the instructors to be men of good moral character to be approved by the plaintiff and to abide by all prison rules and regulations in their contact with prisoners.

The company was to pay the plaintiff for the first period of three months for the prison labor used in carrying out the terms of the agreement the sum of $.75 for each dozen shirts made by the prisoners. The company was to inaugurate what is known as the "over time plan", compensation to be paid to prisoners on the basis of $.50 for each additional daily task of 18 shirts, to be figured on the basis of the total production of the prisoner per week. Under this agreement which was in effect from June 1, 1927 to April 1, 1933, the plaintiff made at the Kilby shirt factory approximately 8,500 dozen shirts weekly.

The agreement contained a further provision as follows:

14. This agreement shall be terminated if it is or shall become unlawful by the laws or regulations of the United States to sell or dispose of or transport any material or articles manufactured by prison la-

bor, or if it shall become unlawful to engage prison labor in the manufacture of the articles which are to be manufactured under the terms of this agreement, or if it shall become unlawful under the laws or regulations of the State of Alabama to manufacture the aforesaid products with the aid of prison labor in the State of Alabama, or to ship or transport the same anywhere within the State of Alabama, or if there is any act passed by the State of Alabama requiring prison made goods to be labeled as such, in such event this contract shall become null and void ninety days after said law becomes effective.

Plaintiff has passed no law and made no regulation which forbids the use of prison labor as provided in the agreement; and it is not unlawful to ship or transport prison-made goods within plaintiff state nor are such goods required to be labeled as such.

9. Under the provisions of section 8 of the agreement and during the term thereof the company paid the plaintiff an approximate average of $.75 per dozen shirts for the labor of its prisoners so employed.

10. During the year 1932 the plaintiff kept 22,114 spindles constantly employed in the manufacture of cotton cloth at Kilby and Speigner Prisons, selling eighty per cent. of all such cloth to the company (or under its direction).

Bill of Complaint.

11. The agreement expiring March 31, 1933, the plaintiff sought to renew or extend the same but the company declined to agree to such renewal or extension except for a period of the three months of April, May and June, and at a price of approximately $.54 per dozen shirts and $.05 per yard for chambray, which the plaintiff accepted. The result of such renewal was to reduce the gross income of the plaintiff from the manufacture of shirts for the second quarter of 1933 by the total amount of $11,500 less than the gross income for the previous quarter.

12. In the defendant states of California, Colorado, Iowa, Kentucky, Minnesota, Montana, New Jersey, Ohio, Oklahoma, Oregon, Washington and Wisconsin, there are in effect at this time laws requiring prison-made goods to be labeled or branded; and in the states of Idaho, Indiana, Michigan, New York, North Carolina and Pennsylvania, laws have been recently enacted effective January 19, 1934, forbidding the sale of such goods; and in the State of Arizona a law has been recently enacted and now is in effect forbidding the sale of prison-made goods; all such laws of the defendant states being set out hereinafter as Appendix A and made a part hereof.

13. The Congress of the United States on January 19, 1929, enacted what is known as the Hawes-Cooper Act (herein called the Act) which is set out hereinafter as Appendix B and made a part hereof.

14. For some years past the shirts made at its shirt fac-

tory at Kilby Prison, and shirts made elsewhere in the United States out of the chambray manufactured by the plaintiff at Kilby and Speigner Prisons, have found ready sale in the defendant states in amounts per annum in excess of those set after the name of each of the defendant states, respectively:

Arizona	$ 1,000
California	15,000
Colorado	15,000
Idaho	10,000
Indiana	50,000
Iowa	6,000
Kentucky	50,000
Michigan	80,000
Montana	10,000
New Jersey	20,000
New York	80,000
North Carolina	5,000
Ohio	80,000
Oklahoma	15,000
Oregon	16,000
Pennsylvania	25,000
Washington	10,000
Wisconsin	15,000
Total	$347,000

Of the foregoing enumerated amounts approximately thirty per cent. represents the amount paid to the plaintiff for its labor and material. Due to the laws of the defendant states as set out in Appendix A, and as a result of the necessary effect of the Act the plaintiff, after un-

dertaking to contract for its prison labor and sell its goods, has up to the time of the filing of this bill been unable to make a firm agreement after July 1, 1933 for the employment of the labor of any of its prisoners in the manufacture of shirts or for the sale of any of the goods manuactured by the plaintiff with the labor of such prisoners, for the reason that as plaintiff is informed and on information and belief states, the wholesale and retail merchants who ordinarily deal in shirts made either by the prison labor or from the cloth manufactured by the prison labor of plaintiff are unwilling to make any purchases beyond such as are necessary to supply their immediate demands; nor are they willing to have on hand at the effective date of the Act any prison-made goods for the reason that under the laws of the defendant states, as set out in Appendix A, such merchants will be required to mark and brand such goods, or will be forbidden to sell the same, as a result of which the market price thereof will be greatly lessened in the states requiring the goods to be so marked or branded, although the goods are of themselves harmless, their quality remains unchanged and is not inferior to that of like and comparable goods made by private industry; all due to the unmerited public prejudice which has been aroused against the manufacture of such goods by prison labor and which has found its reaction in the passage of the laws of the defendant states as set out in Appendix A, and of the Act.

15. As a direct result to the plaintiff of the approach of the effective date of the Act, and of the laws of the de-

fendant states as set out in Appendix A, plaintiff lost during the second quarter of the present year in the hire of its prison labor engaged in making shirts the sum of $11,500; and on account of the laws of the defendant states has set out in Appendix A, which would be patently ineffective and invalid without the Act to give them effect and validity, and on account of the terms of the Act, if the plaintiff is successful in finding any market for the sale of such labor for the last six months of the present year, it cannot hope to secure for the hire of its prison labor in the making of shirts a price equal to its present price of $.54 per dozen shirts, thus resulting in a loss to plaintiff for such labor for the last six months of the present year a sum greater than $28,000; and if the plaintiff is unable to sell the products of its cotton mills as at present and by contract, it will be required to organize a selling agency or sell such goods through selling agencies now existing at an additional cost or loss to the plaintiff amounting to at least $18,000 for the last six months of the present year.

16. Heretofore plaintiff has used its cotton crop in its cotton mills and has sold approximately ninety per cent. of its potato crop in the produce markets of the country. If the marking and branding laws of the defendant states as set out in Appendix A are valid, it will be difficult if not impossible, for any of its cotton crop to be sold in any of the defendant states having such laws for the reason that goods made of the same and shipped in interstate commerce are required to be marked and branded before

the same are sold, indicating to the public that they are made of cotton produced by prison labor; and it will be likewise difficult if not impossible for any of its potato crop to be sold in any of the defendant states having marking and branding laws for the like reason that whenever any of the same is sold in the markets of such states the baskets or crates in which the same are kept and sold will be required to be tagged or marked showing that the potatoes were produced by prison labor; all resulting in a probable loss to the plaintiff of more than $150,000 per annum.

17. There is nothing exceptional about the goods manufactured by the plaintiff and the shirts made by it and they are no different from similar goods and shirts made in factories in which free labor is employed; nor is there anything harmful, deleterious, injurious or unhealthful in such goods or in handling the same in interstate commerce or otherwise. The method of manufacture of the chambray is similar to the method used in factories where free labor is employed and there is no difference in quality between goods made by prison labor and like goods made by the labor of private industry. There is nothing exceptional about the cotton and potatoes produced by the plaintiff and they are no different from like products resulting from the employment of free labor; nor is there anything harmful, deleterious, injurious or unhealthful in such products or in handling the same in interstate commerce or otherwise. There is no difference in quality be-

tween such products resulting from prison labor and like products resulting from the employment of free labor.

18. The investments of the plaintiff in its Kilby and Speigner cotton mills and in its Kilby shirt factory amounting to a sum in excess of $800,000, will be rendered practically valueless as a result of the inability of the plaintiff to find an employer of its idle convict labor and a market for its prison-made goods. In addition to this loss, the total annual expense of maintaining its idle prisoners released from its cotton mills and shirt factory and those released from its cotton and potato farming activities, amounting to approximately $550,000 per annum, will be added to its necessary governmental expenses and will impose an additional burden on plaintiff's taxpayers.

19. The financial loss suffered by the plaintiff as a result of the enforcement of the laws of the defendant states as set out in Appendix A, while a matter of considerable importance to the plaintiff, is not the sole nor even the major injury which plaintiff will suffer as a result of such enforcement. The plaintiff undertakes not only to discipline its prisoners as a punishment for crime, but to interest them in industrial activity and train them so that they may make an honest livelihood upon the expiration of their terms. Without real work available, which is hard and steady, it is difficult to transform, redeem or rehabilitate a prisoner so as to make of him a law-abiding citizen upon his release from prison. It is inevi-

table that the performance of any kind of constructive work must come in conflict and in competition with similar work performed by free labor outside prison walls, and it is likewise inevitable that the rehabilitation of one who has committed crime cannot be brought about if his entire time is taken up only with recreation, physical exercise, moving pictures, lectures, baseball games, library work and other entertainment.

As set out herein, the plaintiff's 5,515 prisoners are engaged in many and various activities, 1,256 of whom have been customarily and are now employed in the mills and shirt factory referred to. As a result of the failure to secure a market after January 1, 1934 for plaintiff's goods plaintiff will find these 1,256 prisoners added to its present list of unemployed. Likewise, as a result of the failure to secure a market after January 1, 1934 for the cotton and potatoes produced on the plaintiff's farms, the plaintiff will find 580 prisoners heretofore engaged in such farming activities added to its list of unemployed. Such additional unemployment will have a very serious effect on its prison population. It is undeniable that prisoners who have no productive labor to perform become restless, untractable, unruly and ultimately desperate. presenting difficult problems to prison officials, sometimes resulting in riots in which prisons are fired with resultant loss of life and property. Nor is it extraordinary for prisoners who sit in idleness day after day and year after year, and who are deprived of productive labor, ultimately to lose their reason and become insane.

20. Notwithstanding the invalidity of the Act, and of the fact that under its terms it does not become effective until January 19, 1934, its very existence is sufficient to bring about after January 1, 1934 the probable unemployment of 1,256 prisoners, now engaged in the cotton mills and shirt factory of the plaintiff, and the probable unemployment of 580 prisoners now engaged in producing cotton and potatoes on the farms of the plaintiff, and this unemployment will last until this Court shall restrain the operation of the Act or declare the same invalid, or until the plaintiff undertakes to provide activities in lieu of its mill and shirt industries, and cotton and potato farming. If plaintiff undertakes to provide such activities, limited as it finds itself to markets within its own borders, it will be required to construct industrial plants, manufacturing among other commodities, clothing for the inmates of its eleemosynary institutions, text-books and furniture for its schools, printing, stationery and furniture for its county and municipal officers and supplies for all of them. Such investment is reasonably estimated at between $700 and $1,000 per prisoner, or a total of more than $1,000,000 which the plaintiff would be required to invest in plants for the manufacture of clothing, text-books, furniture, printing, stationery and supplies. Such an investment the plaintiff is not in financial position to undertake. Its income for the fiscal year ending September 30, 1932 was nineteen and 64-100 per cent. less than that for the preceding year and it does not appear at this time that such decrease will be less for the present fiscal year. The plaintiff, therefore, finds itself in such a situa-

tion that its income from taxes is insufficient to meet its appropriations for normal governmental purposes and that the financial condition of the public is such that the imposition and exaction of additional taxes should not be made nor should additional indebtedness be incurred for the purpose of creating capital investments to provide industry for its idle prison population.

In lieu of providing such industrial activities, plaintiff will be required to begin the construction not later than October 1, 1933, of additional prisons in order to house safely and comfortably a part of its prison population which will become idle on January 1, 1934. At the present time this prison population which is employed in its shirt factory and cotton mills, is divided into night and day shifts, and in this way the constant crowding of prisoners which would otherwise result is avoided. With employment in its shirt factory and cotton mills terminated, such crowded condition will arise and the plaintiff will be required to construct additional prisons which, if of a temporary construction not built of brick or stone, will cost not less than $100,000.

21. Plaintiff avers that the laws of the defendant states as set out in Appendix A, conflict with the Commerce Clause of the Constitution of the United States under which Congress has power to regulate commerce among the several states (Art. I, Sec. 8, Cl. 3) and likewise the Hawes-Cooper Act conflicts with the Commerce Clause, Congress being without power to impose burdens

on commerce among the states except in those instances where Congress deals with activities or objects which are harmful to the public health, morals or welfare.

The Act results in imposing burdens on the transportation in interstate commerce of goods made in prisons, of goods made from cotton produced by prison labor and of farm prducts tilled by such labor, all as an exercise of the police powers of the states, which it is not within the power of Congress to do. The Act likewise undertakes to control the plaintiff in the exercise of its police power over the employment and occupation of its prison population, to invade the control by the plaintiff of a matter purely local in its character and to destroy the sovereignty of the plaintiff in the exercise of police powers reserved to it under the Tenth Amendment to the Constitution.

PRAYER

Inasmuch as plaintiff has no adequate remedy at law for the injuries herein complained of and can secure appropriate relief only in a court of equity, plaintiff prays:

1. That this Court shall by its final judgment order, adjudge and decree that the several laws of the defendant states as set out in Appendix A, are invalid and inoperative as to the plaintiff, and are in violation of the Constitution of the United States and void and of no effect.

2. That this Court shall by its final judgment order, adjudge and decree that the Act of Congress approved January 19, 1929, entitled "A Bill to divest goods, wares, and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain cases," is in violation of the Constitution of the United States and, therefore, void and of no effect.

10

3. That the defendants, the States of Arizona, California, Colorado, Idaho, Indiana, Iowa, Kentucky, Michigan, Minnesota, Montana, New Jersey New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Washington and Wisconsin, and all and several the persons in power under their authority, be restrained and perpetually enjoined by order of this Court from attempting to enforce the statutes as set out in Appendix A.

20 4. That until final hearing shall have been had herein and the final decree of this Court shall have been rendered, the defendants, the States of Arizona, California, Colorado, Idaho, Indiana, Iowa, Kentucky, Michigan, Minnesota, Montana, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Washington and Wisconsin, and all and several the persons in power under their authority, be restrained and enjoined from enforcing or attempting to enforce the statutes set out in Appendix A.

30

5. That such other and further relief whether herein specifically prayed for or not, be granted, as right and jus-

tice shall require, and as to this Court shall seem meet, necessary, just and proper.

6. That a subpoena of the United States of America be issued out of and under the seal of this Court, directed to the States of Arizona, California, Colorado, Idaho, Indiana, Iowa, Kentucky, Michigan, Minnesota, Montana, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Washington and Wisconsin, to be served upon the governor and the attorney-general of each, commanding the defendants on a day certain to be therein named, to be and appear before this Honorable Court, and then and there to answer, but not under oath, answer under oath being specifically waived, all and singular the averments of this bill, and to perform and obey such order, direction and decree as may be made against the defendants in the premises.

STATE OF ALABAMA,

By THOMAS E. KNIGHT, Jr.,
Attorney General.

WM. LOGAN MARTIN,
Counsel.

Bill of Complaint.

STATE OF ALABAMA,
MONTGOMERY COUNTY

Before the undersigned authority personally appeared William F. Feagin, who, having been duly sworn according to law, deposes and says that he is Director of the State Board of Administration of the State of Alabama, that there is imposed on him by law the duty of directing and supervising the activities of the convict system of the State of Alabama; that he has read the foregoing bill of complaint, that the statements therein made as of fact are true and correct and the statements alleged on information and belief he believes to be true and correct.

WILLIAM F. FEAGIN.

Sworn to and subscribed before me, this May 3, 1933.

A. HEUSTESS.

APPENDIX A.

ARIZONA

Chapter 103, Laws 1933, Page 197.

(House Bill No. 118.)
(Regular Session)

AN ACT relating to the sale in the open market of goods, wares and merchandise manufactured, produced or mined by convicts or prisoners.

Be it enacted by the Legislature of the State of Arizona:

Section 1. No goods, wares or merchandise manufactured, produced or prepared wholly or in part by convicts or convict labor, except convicts or prisoners on parole or probation, shall be sold or exchanged on the open market within the state of Arizona.

Section 2. The sale of goods, wares or mechandise prohibited by Section 1 of this Act shall extend to and apply to all goods, wares or merchandise prepared, produced or manufactured wholly or in part by convicts or prisoners of other states and the same shall be subject to the operation and effect of the laws of this state upon arrival and delivery within the state of Arizona to the same extent and in the same manner as though such goods, wares and merchandise had been manufactured, produced or mined with-

in the state of Arizona, and shall not be exempt by reason of being introduced in the original package or otherwise.

Section 3. It shall be unlawful for any board, commission or officer of the state of Arizona or any of its subdivisions to enter into any contract for the expenditure of any public moneys to be paid for any goods, wares or merchandise prepared or manufactured wholly or in part by convicts or prisoners except convicts or prisoners on parole or probation.

Section 4. Sale upon the open market as outlined in Sections 1 and 2 of this Act shall not include sales or exchanges between any penal or charitable institutions maintained wholly by the state of Arizona or its political subdivisions for use in any of such institutions or by the wards thereof.

Section 5. Any person or any manager or agent for any person or corporation who shall violate the provisions of this Act shall, upon conviction, be punished by a fine of not less than one hundred ($100.00) dollars and not more than one thousand ($1000.00) dollars and by imprisonment in the county jail for a period of not less than ninety (90) days nor more than one (1) year.

CALIFORNIA

STATUTES AND AMENDMENTS TO THE CODES

California—1929—Extra Session
1928
P. 1962

CHAPTER 881.

An act to provide for the labeling, disinfecting and advertising of convict-made goods, wares and merchandise, and requiring that notice that such articles are on sale shall be conspicuously posted in places where such articles are offered for sale.

[Approved by the Governor June 19, 1929.
In effect August 14, 1929.]

The people of the State of California do enact as follows:

SECTION 1. No person, firm, partnership, association or corporation within this state shall sell or offer, trade, consign, keep, expose or display for sale any goods, wares or merchandise manufactured, assembled, produced or mined in whole or in part by convicts or prisoners in any penitentiary, prison, reformatory or other establishment in which convct labor is employed, unless such convict-made goods, wares or merchandise are plainly, legi-

bly, conspicuously and indelibly branded, molded, embossed, stenciled or labeled with the words "Convict-made" in plain, bold letters followed by the name of such penitentiary, prison, reformatory or other establishment in which the goods, wares or merchandise were made.

It is hereby specifically provided that any article of convict-made goods, wares or merchandise, as described in paragraph one of this section, may be labeled by the attachment of a label not smaller than four inches long and two inches wide, upon which is printed the words "Convict-made," in plain, bold letters followed by the name of such penitentiary, prison, reformatory or other establishment in which the goods, wares or merchandise were made, providing that in the judgment of officials charged with the enforcement of this act such convict-made goods, wares or merchandise can not be legibly, conspicuously and indelibly branded, molded, embossed, stenciled or labeled as provided in paragraph one of section 1 of this act.

The size and type of such stenciling or label must be consistent with the size and character of the merchandise to which such stenciling or label applies. The size, type and character of such stenciling or label will be subject to the approval of the officials of the State of California responsible for the enforcement of this act.

SEC. 2. No person, firm, partnership, association or corporation within this state shall sell or offer, trade, con-

sign, keep, expose or display for sale any goods, wares or merchandise manufactured, assembled, produced or mined in whole or in part by convicts or prisoners in any penitentiary, prison, reformatory or other establishment in which convict labor is employed, unless such convict-made goods, wares or merchandise have first been disinfected or sterilized in a plant located in California and licensed by the state department of health in accordance with any regulations of the state board of public health now in force or which later may be made effective.

It is hereby further provided that certificate of such disinfection or sterilization must accompany, be stamped on or attached to such goods, wares or merchandise in a manner or form prescribed by the officials of the State of California responsible for the enforcement of this act.

SEC. 3. No person, firm, partnership, association or corporation within this state shall sell or offer, trade, consign, keep, expose or display for sale any goods, wares or merchandise manufactured, assembled, produced or mined in whole or in part by convicts or prisoners in any penitentiary, prison, reformatory or other establishment in which convict labor is employed, unless such person, firm, partnership, association or corporation shall keep permanently and conspicuously displayed within the same enclosure and within ten feet of the place where said convict-made goods, wares or merchandise are kept, exposed, displayed or offered for sale a suitable sign, at least thirty-six inches wide and ten inches high, on which appear in

legible letters not less than two inches high the following words: "Convict-made products on sale here."

SEC. 4. Any person, firm, partnership, association or corporation within this state, when advertising in any periodical or publication any goods, wares or merchandise made in whole or in part by convicts or prisoners in any penitentiary, prison, reformatory or other establishment in which convict labor is employed, must insert the words, "Convict-made," in such advertisement in type or other letters conforming in size or shape to those used in the text of said periodical or publication.

SEC. 5. The provisions of this act shall not apply to any goods, wares or merchandise manufactured in any penitentiary or prison of this state.

SEC. 6. Any person, firm, partnership, association or corporation violating the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars or more than five hundred dollars for each offense, or by imprisonment in the county jail for not less than thirty days or more than six months or by both such fine and imprisonment.

SEC. 7. The enforcement of the provisions of this act shall be under the supervision of the state superintendent of weights and measures.

SEC. 8. The state superintendent of weights and measures or any deputy or inspector authorized by him, shall have access to any premises or any records held by any person, firm, partnership, association or corporation containing any information pertaining to the convict-made goods, wares or merchandise referred to herein.

SEC. 9. If any of the preceding paragraphs or parts therein shall be found unconstitutional or invalid, the remainder of this section shall not thereby be invalidated but shall remain in full force and effect.

SEC. 10. All acts or parts of acts inconsistent herewith are hereby repealed.

COLORADO

Compiled Laws of Colorado—1921

CHAPTER LIX

CONVICT GOODS

8752. CONVICT GOODS MUST BE LAVELED OR MARKED.—Sec. 8. All goods, wares or mer-merchandise made or partly made by convict labor in any penitentiary, prison or reformatory or other establishments shall, before being exposed for sale, be branded, la-

beled or marked as hereinafter provided, and shall not be exposed for sale in any place within this state without such brand, label or mark.

3753. CONTENTS OF BRAND, LABEL OR MARK—WHEN EACH USED—WHERE PLACED. Sec. 9. The brand, label or mark hereby required shall contain at the head or top thereof the words "Convict-made," followed by the year and name of the penitentiary, prison or reformatory or other establishment in which it was made, in plain English letters, in style known as great primer Roman capitals. The brand or mark shall, in all cases where the nature of the article will permit, be placed upon the same, and only where such branding and marking is impossible a label shall be used, and where a label is used it shall be in the form of a paper tag, which shall be attached by wire to each article, where the nature of the article will permit, and placed securely upon the boxes, crates or other covering in which such goods, wares or merchandise may be packed, shipped or exposed for sale. Said brand, mark or label shall be placed upon the outside of and upon the most conspicuous part of the finished article and its box, crating or covering. In case of manufactured clothing of any nature, such label shall be of linen and securely sewed upon each article of such clothing in a place where upon examination it may be easily discovered.

3754. PROSECUTION FOR VIOLATION—PENALTY. Sec. 10. When, upon complaint or oth-

erwise, the deputy labor commissioner has reason to believe that this act is being violated, he shall advise the district attorney of the county in which such alleged violation has occurred of the fact, giving the information in support of his conclusions, and said district attorney shall at once institute the proper legal proceedings to compel compliance with the act. Any person offending against the provision of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay a fine not exceeding ten hundred (1000) dollars and not less than fifty (50) dollars, or to be imprisoned for a term not exceeding twelve months and not less than ten days, or both.

3755. EVIDENCE OF VIOLATION. Sec. 11. It shall be lawful for any person, persons or corporation to furnish evidence as to the violation upon the part of any person, persons or corporation, and upon the conviction of such person, persons or corporation, one-half of the fine provided for by this act, which shall be secured, shall be paid to the deputy labor commissioner, to be used by him in investigating and securing conviction for violation thereof.

IDAHO

Chapter 216, Laws 1933, Page 255.

(House Bill No. 299.)
(Regular Session)

AN ACT forbidding the sale of convict-made goods on the open market and applying state regulations as to the sale and distribution of convict-made goods to all such products regardless of origin, and defining open market: and providing a penalty.

Be it enacted by the Legislature of the State of Idaho:

Section 1. The sale on the open market of this state of all goods, wares or merchandise manufactured or mined, wholly or in part by any penal and/or reformatory institution is hereby prohibited. On and after January 19, 1934, the provisions of this Act, and all other regulations and laws of this state in effect at that time and not inconsistent with this Act shall apply to all goods, wares and merchandise manufactured or mined wholly or in part, by convicts or prisoners (except prisoners on parole or probation) or in any penal and/or reformatory institution and transported into the state of Idaho for use or distribution, to the same extent and in the same manner as if such goods and merchandise were so manufactured, produced or mined within the state of Idaho.

Section 2. It is hereby declared unlawful for the State of Idaho, or any of its officers or agencies, or any of the political subdivisions thereof, to enter into any contract or other arrangement for the labor of any of the inmates of any of the penal and/or reformatory institutions of this state.

Section 3. For the purposes of this Act the provisions of Section 1 relating to sales on the open market shall not include the sale and/or exchange of convict-made goods produced in the penal and/or reformatory institutions to or with other penal, charitable, reformatory and/or custodial institutions the major portion of whose maintenance is contributed by this state and/or any of the political subdivisions thereof, for the use and/or consumption of said institutions or for the use and/or consumption of the population therein confined.

Section 4. The exchange of the prison products of institutions of this state as specified in this Act with the products of any other state is hereby prohibited.

Section 5. The Prison Board is hereby authorized and directed to make such rules and regulations governing the conduct of industries in the penal and/or reformatory institutions of this state as will (a) result in the manufacture, mining or production of only such goods, wares or merchandise as may be used or needed in the several penal, custodial, charitable and/or reformatory institutions the major portion of whose maintenance is contrib-

uted by this state or any of the political subdivisions thereof, or for the use and consumption of the institutionally confined population of said institutions; and (b) result in the manufacture at such penal and/or reformatory institutions of as wide a variety of products as practicable, it being the purpose and intent of this provison to direct the management of said institutions to so diversify the products of said institutions as to eliminate the concentration of prison labor in any one or few industries, thus to minimise as nearly as may be possible the competition of said industries with private industry and private capital; Provided, however, that no goods, wares or merchandise manufactured or mined in any penal and/or reformatory institution of this state shall be shipped outside of this state for sale and/or exchange.

Section 6. The Prison Board shall make such rules and regulations as may be necessary to set up in the said penal and/or reformatory institutions of this state a cost accounting system in connection with the manufacture or production of all goods, wares or merchandise of said institutions, which cost accounting system shall take into consideration a reasonable compensation to be set aside for the labor of any prisoner or convict employed in any industry of said institutions, which compensation shall be held for the benefit of said prisoner or convict, or under proper rules and regulations remitted to the dependents of said prisoners or convicts.

Section 7. The sale price of products made in any penal, and/or reformatory institution for the sale to or the use of any of the institutions hereinabove mentioned, shall be as nearly as practicable the same as the sale price of similar merchandise manufactured in private industry.

Section 8. The Governor and such officials as may direct or control the management of penal, custodial, charitable and/or reformatory institutions of the state or political subdivisions thereof, shall jointly, annually effect such rules and regulations as may be necessary to carry out the purpose and intent of this Act; to-wit, the purchase by said institutions of the products to be manufactured in the penal and/or reformatory institutions of this state.

Section 9. The words "open market" as used in this Act, shall mean all sales and/or exchanges conducted or transacted through the medium of stores, shops, sales offices, sales agents or agencies, whether retail or wholesale, or in any other manner, to the consuming public.

Section 10. Whoever sells or exposes for sale any goods, wares or merchandise, manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation or in any penal and/or reformatory institutions except in the method established by law shall upon conviction be subject to a fine of three hundred dollars ($300) or imprisonment for ninety days

or both such fine and imprisonment, and each such sale or offer for sale shall be considered a separate offense.

Approved, March 18, 1933.

INDIANA

BURNS' ANNOTATED INDIANA STATUTES

Revision of 1914

8262. (7287b.) *Sale of convict-made goods*—License. —1. That it shall be unlawful for any person or persons or corporations to expose for sale within the state of Indiana, without first obtaining from the secretary of state a license to sell any convict-made goods, merchandise or wares, as hereinafter provided.

8263. (7287c.) *Application for license—Bond.*—2. Every person, persons or corporation desiring to act as agent for or to deal in convict-made goods, merchandise or wares, before exposing such goods within the limits of the state of Indiana, shall make an application in writing to the secretary of state, setting forth his or their residence, or office, the class of goods he, they or it desires to deal in the town, village or city, giving the street number at which he, they or it intends to locate, together with the names of two or more responsible citizens of the state

of Indiana, who shall enter into a bond of not less than five thousand dollars, to guarantee that the said applicant will in all and every particular comply with any and all laws of the state of Indiana, regulating and prescribing the sale of convict-made goods, wares and merchandise.

8264. (7287d.) *Issue of license—Posting.*—3. The secretary of state shall thereupon issue a license to such applicant for one year, except as hereinafter provided, which license shall set forth the name of the person, persons or corporation, and shall be kept conspicuously posted in his, their or its place of business.

8265. (7287e.) *Statements by persons selling goods.*—4. Such person, persons or corporations shall annually, before the fifteenth day of January in each year, transmit to the secretary of the state a verified statement setting forth:

1. The name of the person, persons or corporation.

2. His, their or its place of business.

3. The names of the persons, agents, warden or keepers of any prison, jail, penitentiary or reformatory, or establishment using convict labor, with whom he has done business, and the person, persons or corporation to whom he has sold goods, wares or merchandise, giving the state, city or town and street number of such purchaser or purchasers.

4. In general terms the amount paid to each of such agents, wardens or keepers, for goods, wares, or merchandise, and the character of goods, wares or merchandise so received.

8266. (7287f.) *Fee for license.*—5. Every person, persons or corporation shall pay annually, upon the issue of such license as hereinbefore provided, the sum of five hundred dollars to the secretary of state as a license fee, which amount shall be credited to the maintenance account of the state prison.

8267. (7287g.) *Term of license.*—6. Licenses shall be for one year unless revoked as subsequently provided.

8268. (7287h.) *Revocation of license.*—7. The secretary of state shall have the power to revoke the license of any person, persons or corporation upon satisfactory evidence or upon conviction for any violation of any law regulating the sale of convict-made goods, wares or merchandise; but no such revocation shall be made until due notice to the person, persons or corporation so complained of; and for the purpose of this section the said secretary of state, or his authorized agents, shall have power to administer oath and to compel the attendance of persons and the production of books, papers, et cetera.

8269. (7287i.) *Labeling of goods.*—8. All goods, wares or merchandise made or partly made by convict labor in any penitentiary, prison, reformatory or other es-

tablishment shall before being exposed to sale, be branded, labeled or marked as hereinafter provided, and it shall not be exposed for sale in any place within this state without such brand, label or mark.

8270. (7287j.) *Contents of label—How affixed.*—9. The brand, label or mark hereby required shall contain at the head or top thereof the words "Convict-made," followed by the year and name of the penitentiary, prison, reformatory or other establishment in which it was made, in plain English letters of the style known as great primer Roman capitals. The brand or mark shall in all cases, where the nature of the article will permit, be placed upon the same, and only where such branding or marking is impossible a label shall be used; and where a label is used it shall be in the form of a paper tag, which shall be attached by wire to each article, where the nature of the article will permit, and placed securely upon the boxes, crates or other covering in which such goods, wares or merchandise may be packed, shipped or exposed for sale. Said brand, mark or label shall be placed upon the outside of, and upon the most conspicuous part of the furnished [finished] article and its box, crate or covering. In case of manufactured clothing of any nature, such label shall be of linen and securely sewed upon each article of such clothing in a place where upon examination it may be easily discerned.

8271. (7287k.) *Violating act—Prosecution—Penalty.*—10. When upon complaint or otherwise commissioner

of labor statistics has reason to believe that this act is being violated, he shall advise the prosecuting attorney of the county in which such alleged violation has occurred of that fact, giving the information in support of his conclusions, and the prosecuting attorney shall at once institute the proper legal proceedings to compel compliances with this act. Any person offending against the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be sentenced to pay a fine not exceeding ten hundred dollars, and not less than fifty dollars, or to be imprisoned for a term not exceeding twelve months nor less than ten days, or both.

8272. (7287l.) *Fee to informer.*—11. It shall be lawful for any person, persons or corporation to furnish evidence as to the violation upon the part of any person, persons or corporation, and upon the conviction of such person, persons or corporation one-half of the fine provided for by this act which shall be secured, shall be paid to the commissioner of labor statistics to be used by him in investigating and securing information regarding violations of this act and in paying expenses of securing conviction for violations thereof: *Provided,* That this act shall not apply to outstanding or existing contracts.

Bill of Complaint—Appendix A."

INDIANA

Chapter 269, Laws 1933, Page 847.

(House Bill No. 23.)
(Regular Session)

AN ACT pertaining to goods, wares and merchandise manufactured, produced or mined by convicts or prisoners.

Section 1. Be it enacted by the General Assembly of the State of Indiana, That all goods, wares and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institution, transported into the State of Indiana, and remaining therein for use, consumption, sale, or storage, shall, upon arrival and delivery in the State of Indiana, be subject to the operation and effect of the laws of the State of Indiana, to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in the State of Indiana by inmates of the Indiana Reformatory, or the Indiana State Prison, or of the Indiana State Farm; and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

Section 2. This Act shall take effect on the 19th day of January, 1934.

Approved, March 11, 1933.

IOWA

(Iowa 1933 New Laws, Page 173.)

(Senate Bill No. 129.)
(Regular Session)

AN ACT to amend Title X of the Code, relating to regulations and inspections, by adding thereto a chapter requiring that all prison-made goods from this or other states be distinctly marked as such before being exposed for sale in Iowa, and prescribing the penalty for violations and limiting time for the taking effect thereof.

Be it enacted by the General Assembly of the State of Iowa:

Section 1. That Title X of the Code be and the same is hereby amended by adding a new chapter thereto, at the end thereof, as follows:

"Section 1. Labels on prison-made goods. Beginning January 19, 1934 all goods, wares and merchandise made by convict labor in any penitentiary, prison, reformatory

or other establishment in which convict labor is employed in the state of Iowa and all such goods, wares and merchandise made by convict labor in any penitentiary, prison, reformatory, or any institution outside the State of Iowa in which convict labor is so employed and which is imported, brought or introduced into this state shall, before being exposed for sale, be branded, labeled or marked as herein provided, and shall not be exposed for sale in this state without such brand, label or mark. Such brand, label or mark shall contain at the head or top thereof the words, 'prison-made' followed by the year and name of the penitentiary, prison, reformatory or other establishment in which it was made, in plain English lettering, of the style and size known as great primer roman condensed capitals. The brand or mark shall in all cases, where the nature of the article will permit, be placed upon the same, and only where such branding or marking is impossible shall a label be used, and where a label is used it shall be in the form of a paper tag, which shall be attached by wire to each article, where the nature of the article will permit, and placed securely upon the box, crate or other covering in which such goods, wares or merchandise may be packed, shipped or exposed for sale. Said brand, mark or label shall be placed upon the outside of and upon the most conspicuous part of the finished article and its box, crate or covering.

Section 2. Penalty for selling such goods, etc. A person knowingly having in his possession for the purpose of sale or offering for sale any prison-made goods, wares or

merchandise manufactured in any state without the brand, mark or label required by law, or who removes or defaces such brand, mark or label shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars.

Section 8. Provided, however, that the provisions of this Act shall not be effective unless and until the Hawes-Cooper Act becomes effective.

Approved, April 15, 1988.

KENTUCKY

KENTUCKY STATUTES (Carroll) 1915, Vol. 1

CHAPTER 80.

(Act of March 12, 1894.)

CONVICT-MADE GOODS—COAL, COKE.

Sec. 524. *Brands or labels required—exception.* All goods, wares and merchandise made by convict labor in any penitentiary, prison, reformatory or other establishment in which convict labor is employed in any State, except the State of Kentucky, and imported, brought or

introduced into the State of Kentucky, shall, before being exposed for sale, be branded, labeled or marked as hereinafter provided, and shall not be exposed for sale in any place within this State without such brand, label or mark.

Sec. 525. *Brand or label—what to contain and where placed.* The brand, label or mark hereby required shall contain, at the head or top thereof, the words "convict made," followed by the year and name of the penitentiary, prison, reformatory or other establishment in which it was made, in plain English lettering, of the style and size known as great primer Roman condensed capitals. The brand or mark shall in all cases, where the nature of the article will permit, be placed upon the same, and only where such branding or marking is impossible shall it be placed upon the box or other covering of the same, or be attached to the article as a label. Said brand or mark shall be placed upon the most conspicuous part of the article or its covering, and said label, when used instead of a brand or mark, shall be attached in the most conspicuous place.

Sec. 526. *Dealing in unbranded goods—removing or defacing brand—penalties.* It shall not be lawful for any person dealing in this State in any such convict-made goods, wares or merchandise manufactured in any State, except the State of Kentucky, knowingly to have the same in his possession for the purpose of sale, or to offer the same for sale, without the brand, mark, or label required by this act, or to remove or to deface such brand, mark or label. Any person offending against the pro-

visions of this act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars, or to be imprisoned for a term not exceeding twelve months, or both, in the discretion of the jury or court trying the case.

Sec. 526a. *Convict-mined coal and coke—penalty.* 1. All coal mined or coke manufactured by convict labor in any State, and imported, brought, or introduced into the State of Kentucky, shall, during shipment and before being exposed for sale, or used in any place within this State, having a placard or label attached in a conspicuous place to the car, barge or other conveyance transporting such coal or coke, marked "Convict-mined Coal," or "Convict-made Coke," in plain English bold-faced lettering, not less than four inches in height. And all vehicles used in retailing or conveying the same within this State shall, in a similar manner, be marked or labeled in a conspicuous place.

2. It shall not be lawful for any person dealing in such convict-mined coal or convict-made coke knowingly to have the same in his possesson for the purpose of sale or use, or to offer the same for sale, except under the conditions prescribed in and by Section 1 of this act.

Any person offending against the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay a fine not exceeding five hundred dollars, or to be imprisoned for a term not ex-

ceeding twelve months, or both, in the discretion of the jury or court trying the case. (*This section is an act of April* 29, 1897.)

MICHIGAN, 1933

Regular Session
(House Bill No. 468)

A BILL

Relative to the sale on the open markets of this state of all goods, wares and merchandise manufactured, or mined, wholly or in part, by convicts or prisoners, or in penal and reformatory institutions.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. The words "open market" as used in this act shall be construed to mean all sales and/or exchanges conducted or transacted through the medium of stores, shops, sales offices, sales agent or agencies, whether retail or wholesale, or in any other manner, to the consuming public.

Sec. 2. The sale on the open market of this state of all goods, wares, and merchandise manufactured or mined,

wholly or in part, by convicts or prisoners, except prisoners on parole or probation, or in any penal and/or reformatory institution is hereby prohibited: Provided, however, that the provisions of this act shall not apply to Michigan convict-made goods where there is no competitive industry in such goods in the state of Michigan at the time this act becomes effective. On and after Jan. 19, 1934, the provisions of this act, and all other regulations and laws of this state in effect at that time and not inconsistent with this act shall apply to all goods, wares and merchandise manufactured, or mined wholly or in part, by convicts or prisoners, except prisoners on parole or probation, or in any penal and/or reformatory institution, and transported into the state of Michigan for use or distribution to the same extent and in the same manner as if such goods, wares and merchandise were so manufactured, produced or mined within the state of Michigan.

Sec. 3. It is hereby declared unlawful for the state of Michigan or any of its officers or agencies, or any of the poltical subdivisions thereof, to enter into any contract or other arrangement for the labor of any of the inmates of any of the several penal and/or reformatory institutions of this state.

Sec. 4. For the purposes of this act the provisions of section 2 relating to the sales on the open market shall not include the sale and/or exchange of convict-made goods produced in the penal and/or reformatory institutions to or with other penal, charitable, reformatory and/or cus-

todial institutions the major portion of whose maintenance is contributed by this state and/or any of the political subdivisions thereof, for the use and/or consumption of said institutions or for the use and/or consumption of the population therein confined.

Sec. 5. The exchange of the prison products of institutions of this state as specified in this act with the products of any other state is hereby prohibited.

Sec. 6. The prison commission is hereby authorized and directed to make such rules and regulations governing the conduct of industries in the penal and/or reformatory institutions of this state as will (a) result in the manufacture, mining or production of only such goods, wares or merchandise as may be used or needed in the several penal, custodial, charitable and/or reformatory institutions the major portion of whose maintenance is contributed by this state or any of the political subdivisions thereof, or for the use and consumption of the institutionally-confined population of said institutions; and (b) result in the manufacture at such penal and/or reformatory institutions of as wide a variety of products as practicable, it being the purpose and intent of this provision to direct the management of said institutions to so diversify the products of said institutions as to eliminate the concentration of prison labor in any one or few industries, thus to minimize as nearly as may be the possible competiton of said industries with private industry and private capital; Provided, however, That no goods, wares or merchandise manfactured or

mined in any penal and/or reformatory institution of this state shall be shipped outside of this state for sale and/or exchange.

Sec. 7. The prison commission shall make such rules and regulations as may be necessary to set up in the said penal and/or reformatory institutions of this state a cost-accounting system in connection with the manufacture or production of all goods, wares or merchandise of said institutions, which cost-accounting system shall take into consideration a reasonable compensation to be set aside for the labor of any prisoner or convict employed in any industry of said institutions, which compensation shall be held for the benefit of said prisoner or convict, or under proper rules and regulations remitted to the dependents of said prisoner or convict.

Sec. 8. The sale price of products made in any penal, and/or reformatory institution for the sale to or the use of any of the institutions hereinabove mentioned, shall be as nearly as practicable the same as the sale price of similar merchandise manufactured in private industry

Sec. 9. The governor and such officials as may direct or control the management of penal, custodial, charitable and/or reformatory institutions of this state, or political subdivisions thereof, shall jointly, annually, effect such rules and regulations as may be necessary to carry out the purpose and intent of this act: to-wit, the purchase by said

institutions of the products to be manufactured in the penal and/or reformatory institutions of this state.

Sec. 10. The provisions of this act shall take effect on January 19, 1934.

MINNESOTA

LAWS OF MINNESOTA 1929

P. 186

CHAPTER 188—H. F. No. 216

An act to require the branding, labeling or marking of prison or convict made goods, wares and merchandise offered for sale or intended for sale in this State and providing penalties for violation thereof.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. *Prison made goods to be labeled.*—Goods, wares and merchandise made by convict labor under contract in this or any other State imported, brought or introduced into this State, shall be branded, labeled or marked as hereinafter provided before being exposed for sale, and shall not be so exposed without such brand, label or mark.

The brand, label or mark required by the next preceding section shall contain at the head or top hereof the words "prison made" followed by the year and name of the penitentiary, prison, reformatory or other establishment in which it was made, in plain English lettering of the style known as great primer roman capitals. Such brand or mark, if the article will permit, shall be placed upon it and when such branding or marking is impossible, label shall be used. Such brand, mark or label shall be placed outside of and in a conspicuous part of the finished article and its box, crate or covering.

A person dealing in convict made goods, wares or merchandise, as described in this chapter, shall not knowingly have them in possession for the purpose of sale, or offering them for sale without the brand, label or mark required by this chapter, or remove, conceal or deface the brand, label or mark thereon; but the provisions hereof shall not apply to such goods, wares or merchandise in possession of any such person at the time of the taking effect of this act.

Whoever violates any provision of this law shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not more than $100 or not to exceed 90 days imprisonment.

Approved April 5, 1929.

MONTANA

REVISED CODES OF MONTANA 1921

Vol. 4.

11572. *Prison-made goods to be stamped.* It shall hereafter be unlawful for any person engaged in the trade of buying and selling or of selling any goods, wares or merchandise or articles or thing to knowingly exhibit or sell or offer for sale any goods, wares, merchandise, article or thing which shall have been produced or manufactured or made by convict labor in any prison, unless such goods shall have plainly stamped or marked thereon the words "prison made."

11573. *Same—Penalty for violation of act.* Any person or persons who shall knowingly sell or offer for sale any goods, wares or merchandise, article or thing produced, made or manufactured in any prison which said goods, wares, merchandise, article or thing shall not have stamped or marked thereon the words "prison made" shall, upon conviction thereof, be deemed guilty of a misdemeanor, and shall be punishable by a fine of not less than twenty-five dollars or more than three hundred dollars, or by imprisonment in the county jail of not less than thirty days or more than ninety days, or by both such fine and imprisonment.

NEW JERSEY

SUPPLEMENT TO COMPILED STATUTES OF NEW JERSEY

1925-1930

P. 1651

PART X. GOODS MADE BY CONVICT LABOR

An Act concerning the sale of goods, wares and merchandise made by convict labor and providing for its enforcement and penalty for its violation.

182-120. *Branding, labelling and marking required*

1. All goods, wares, and merchandise made by convict labor in any jail, penitentiary, prison, reformatory, or other establishment in this State, and all goods, wares, and merchandise made by convict labor in any other State, and introduced, imported, or brought into this State, shall be branded, labelled, or marked as hereinafter provided before being exposed for sale, and shall not be so exposed without such brand, label or mark.

182-121. *Brand, label or mark—requisites of*

2. The brand, label or mark required by the next preceding section shall contain at the head or top thereof the

words "convict made," followed by the year and name of the penitentiary, prison, reformatory, or other establishment in which it was made, in plain English lettering of the style known as great primer Roman capitals. Such brand or mark, if the article will permit, shall be placed upon it and when such branding or marking is impossible, the label shall be used.

182-122. *Where placed*

3. Such brand, mark or label shall be placed outside of and upon the most conspicuous part of the finished article and its box, crate or covering.

182-123. *Possession of unmarked goods—removal, concealment or defacement of marks*

4. A person dealing in convict made goods, wares or merchandise, as described in this act, shall not knowingly have them in possession for the purpose of sale, or offering them for sale without the brand, label or mark required by this act, or remove, conceal or deface the brand, label or mark thereon.

182-124. *Penalties for violations*

5. Any person, firm or corporation violating the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be fined not less than twenty-five or more than fifty dollars for the first offense, and

not less than fifty or more than two hundred dollars for each subsequent offense.

NEW YORK

LAWS OF NEW YORK, 1930

CHAPTER 186
P. 469

AN ACT to amend the general business law, in relation to sale of convct made goods, manufactured or mined in other states

Became a law March 21, 1930, with the approval of the Governor. Passed, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter twenty-five of the laws of nineteen hundred nine, entitled "An Act relating to general business, constituting chapter twenty of the consolidated laws," is hereby amended by inserting therein a new section, to be section sixty-nine, to read as follows:

§ 69. *Sale of convict made goods manufactured or mined in other states.* No goods, wares, or merchandise,

manufactured or mined by convicts or prisoners of other states, except convicts or prisoners on parole or probation, shall be shipped into this state to be sold on the open market, or sold to, or exchanged, with an institution of this state or with any of its political subdivisions.

§ 2. Sections sixty-seven and sixty-eight of such chapter, as added by chapter eight hundred and five of the laws of nineteen hundred twenty-eight, are hereby repealed.

§ 3. This act shall take effect January nineteenth, nineteen hundred thirty-four.

NORTH CAROLINA

(1933 New Laws, Page 165)

(Senate Bill No. 138)
(Regular Session)

AN ACT to prohibit the sale of convict-made goods.

The General Assembly of North Carolina do enact:

Section 1. That except as hereinafter provided, the sale anywhere within the State of North Carolina of any and all goods, wares and merchandise manufactured, produced

or mined wholly or in part, by convicts or prisoners, except by convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions is hereby prohibited and declared to be unlawful.

Section 2. That the provisions of this Act shall not apply to sales or exchanges between the State Penitentiary and other penal, charitable, educational and/or custodial institutions, maintained wholly or in part by the State, or its political sub-divisions, for use in said institution or by the wards thereof; nor shall the provisions of this Act apply to the sale of cotton, corn, grain or other processed or unprocessed agricultural products, including seed for growing purposes, or to the sale of coal or chert mined by convict labor, in any mine operated by the State; provided that this section shall apply with equal force to sales to the State or any political sub-division thereof by any State penal or correctional institution, including the State Highway; provided further that the State of North Carolina shall have the right of manufacturing in any of its penal or correctional institutions products to be used exclusively by the State or any of its agencies.

Section 3. That this Act shall apply equally to convict or prison made goods, wares or merchandise, whether manufactured, produced or mined within or without the State of North Carolina.

Section 4. Any person, firm or corporation selling, undertaking to sell, or offering for sale any such prison

made or convict-made goods, wares or merchandise, anywhere within the State, in violation of the provisions of this Act, shall be subject to fine, or imprisonment, or both, in the discretion of the Court. Each sale or offer to sell, in violation of the provisions of this Act shall constitute a separate offense.

Section 5. All laws and clauses of laws in conflict with this Act are hereby repealed.

Section 6. This Act shall be in force from and after the nineteenth day of January, 1934.

Ratified, March 18, 1933.

OHIO

OHIO GENERAL CODE

CHAPTER 16

LABELS AND MARKS

Convict-made Goods. § 6218. BRAND, ETC., TO BE PLACED UPON CONVICT-MADE GOODS. Goods, wares and merchandise made by convict labor in a penitentiary, prison, reformatory or other establishment in this or any other state in which convict labor is em-

ployed and imported, brought or introduced into this state, shall be branded, labeled or marked as hereinafter provided before being exposed for sale, and shall not be so exposed without such brand, label or mark.

§ 6214. CONTENTS, STYLE AND USE OF BRAND, ETC. The brand, label or mark required by the next preceding section shall contain at the head or top thereof the words "convict made" followed by the year and name of the penitentiary, prison, reformatory or other establishment in which it was made, in plain English letterng of the style known as great primer Roman capitals. Such brand or mark, if the article will permit, shall be placed upon it, and when such branding or marking is impossible a label shall be used.

§ 6215. LABEL. Such label shall be in the form of a paper tag to be attached by wire to each article, where the nature thereof will permit, and placed securely upon the box, crate or other covering in which such goods, wares and merchandise are packed, shipped or exposed for sale.

§ 6216. WHERE PLACED. Such brand, mark or label shall be placed outside of and upon the most conspicuous part of the finished article and its box, crate or covering.

§ 6217. VIOLATIONS BY DEALERS IN CONVICT-MADE GOODS, ETC. A person dealing in

convict-made goods, wares or merchandise, as described in this chapter, shall not knowingly have them in possession for the purpose of sale, or offering them for sale without the brand, label or mark required by this chapter, or remove, conceal or deface the brand, mark or label thereon.

§ 6218. PROSECUTION OF VIOLATORS. Whoever violates any provisions of sections 6218 to 6217 inclusive of the General Code shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined not less than twenty-five, nor more than fifty dollars for the first offense and not less than fifty dollars nor more than two hundred dollars for each subsequent offense.

OKLAHOMA

SESSION LAWS OF OKLAHOMA, 1910

CHAPTER 6.
P. 6

MANUFACTURES—LABELS FOR CONVICT-MADE GOODS

House Bill No. 21.

AN ACT requiring the labeling of all convict made goods sold within the State of Oklahoma; prescribing the

size and form of labels to be used; preventing the removal of labels until after goods are sold to consumers, and providing penalties for the violation thereof.

Be It Enacted By the People of the State of Oklahoma:

Requisites of label.

Section 1. Each article of clothing, harness, saddles or shoes, tools, implements or machinery, or other articles of merchandise manufactured by convicts, or in any prison or penitentiary of any state of the United States, "or in any federal prison or penitentiary," or any territory or district thereof, before being sold or offered for sale in the State of Oklahoma by any merchant, salesman, agent or representative of any firm or corporation or individual, shall bear a label not less than two by two (2x2) inches in dimensions, which shall bear thereon the words convict made goods, followed by the year and the name of the penitentiary, prison, reformatory, or other establishment in which it was made, in plain English lettering of the style known as Roman Capitals. Said label shall be placed upon the outside of and upon the most conspicuous part of said article.

Violation—Misdemeanor.

Section 2. Any merchant, "person, firm or corporation or any" salesman, agent or representative of any firm, corporation or individual, selling or offering for sale

within the State of Oklahoma, clothing, harness, saddles, shoes, or any other articles of merchandise manufactured by convicts, or in any prison or penitentiary of any state, or of the United States, or any territory or district thereof, not bearing said label; or any merchant, salesman, agent or representative of any firm, corporation or individual, who removes said labels from any articles manufactured by convicts or prisoners, prior to its sale to the customer, shall be guilty of a misdemeanor, and shall be punished as thereinafter provided.

Punishment.

Section 8. Any person found guilty of violating the provisions of this Act shall be fined in a sum not less than one hundred ($100.00) dollars, nor more than five hundred ($500.00) dollars, or imprisoned in the county jail for not less than one (1) month, nor more than six (6) months, or both such fine and imprisonment.

Approved February 9, 1910.

Bill of Complaint—Appendix A

OREGON

GENERAL LAWS OF OREGON, 1929

CHAPTER 188
P. 100

AN ACT

Regulating the sale, exposure and display of convict-made goods, wares and merchandise and providing a penalty for the violation of any provisions contained therein.

Be It Enacted by the People of the State of Oregon:

Section 1. No person, firm or corporation within this state shall sell, offer, keep, expose or display for sale any goods, wares or merchandise, made in whole or in part by convict labor in any penitentiary, prison, reformatory or other establishment outside the state of Oregon in which convict labor is employed, unless such commodity has been first properly disinfected, in accordance with the rules and regulations of the state board of health, and unless such convict-made goods, wares or merchandise offered, kept, exposed or displayed for sale are labeled permanently, plainly and legibly with the words "These Goods Are Convict-made" in plain, bold letters, followed by the name of the penitentiary, prison, reformatory or other establishment in which the goods, wares or merchandise were made; provided, that when advertised in any periodical or

publication the wording herein required shall appear in type and/or letters conforming in size and shape to those used in the general text of said periodical or publication.

Section 2. Any person or officer of any corporation who shall violate any of the provisions of this act shall be guilty of a misdemeanor and, upon conviction therefor, shall be liable to a fine of not less than $50 nor more than $300 and/or imprisonment in the county jail for not less than 30 days nor more than six months.

Approved by the governor February 19, 1929.
Filed in the office of the secretary of state February 20, 1929.

PENNSYLVANIA

LAWS OF PENNSYLVANIA, 1931.

No. 308
P. 922

AN ACT

Restricting the sale of goods, wares and merchandise prepared and manufactured without this Commonwealth by convicts and prisoners; and providing penalties.

Bill of Complaint—Appendix A.

Section 1. Be it enacted, &c., That no goods, wares or merchandise prepared wholly or in part or manufactured by convicts or prisoners of other states, except convicts or prisoners on parole or probation, shall be sold or exchanged on the open market within this Commonwealth.

Section 2. Any person, or any agent or manager for any person, who shall violate any of the provisions of this act shall, upon conviction thereof, be sentenced to pay a fine of not more than five hundred dollars ($500), or to undergo an imprisonment of not more than one year, or both, at the discretion of the court.

Section 3. This act shall take effect January nineteenth, one thousand nine hundred and thirty-four.

Section 4. All acts or parts of acts inconsistent herewith be and the same are hereby repealed.

APPROVED—The 23d day of June, A. D. 1931.

WASHINGTON

LAWS OF WASHINGTON, 1927

CHAPTER 294
P. 721
[H. B. 266.]

SALE OF CONVICT-MADE GOODS

An Act relating to the sale and exposure and display for sale of convict-made goods, wares and merchandise.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. No person, firm or corporation shall within this state, sell or offer, keep, expose, or display for sale any goods, wares or merchandise, made wholly or in part by convict labor in any penitentiary, prison, reformatory or other establishment outside the State of Washington in which convict labor is employed, unless such commodity has first in accordance with the rules and regulations of the state department of health, been properly disinfected and unless such convict-made goods, wares or merchandise offered, kept, exposed or displayed for sale are permanently, plainly and legibly labeled with the words, "These goods are convict-made" in plain, bold letters, followed by the name of the penitentiary, prison, reformatory or other establishment in which the goods,

wares or merchandise were made; *Provided,* That when advertised in any periodical or publication the wording herein required shall appear in type and/or letters conforming in size and shape to those used in the general text of said periodical or publication.

SEC. 2. Any person, firm or corporation who shall sell or keep, offer, expose or display for sale any convict-made goods, wares or merchandise which shall not have been first disinfected as in this act required, or without exhibiting the label in this act required in the manner provided herein, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment in the county jail for not less than thirty days nor more than six months, or by both such fine and imprisonment.

SEC. 3. Adjudication of invalidity of any of the sections of this act or any part of any section thereof, shall not affect or impair the validity of any other of said sections or remaining part of any of said sections .

Passed the House March 9, 1927.
Passed the Senate March 9, 1927.
Approved by the Governor March 19, 1927.

WISCONSIN

WISCONSIN STATUTES
1929

CHAPTER 132

TRADE-MARKS AND LABELS.

132.13 LABELS ON PRISON-MADE GOODS. All goods, wares and merchandise made by convict labor in any penitentiary, prison, reformatory or other establishment in which convict labor is employed in any state, except this state, and imported, brought or introduced into this state shall, before being exposed for sale, be branded, labeled or marked as herein provided, and shall not be exposed for sale in this state without such brand, label or mark. Such brand, label or mark shall contain at the head or top thereof the words "convict-made," followed by the year and name of the penitentiary, prison, reformatory or other establishment in which it was made, in plain English lettering, of the style and size known as great primer roman condensed capitals. The brand or mark shall in all cases, where the nature of the article will permit, be placed upon the same, and only where such branding or marking is impossible shall a label be used, and where a label is used it shall be in the form of a paper tag, which shall be attached by wire to each article, where the nature of the article will permit, and placed securely upon the box, crate or other covering in which such goods,

wares or merchandise may be packed, shipped or exposed for sale. Said brand, mark or label shall be placed upon the outside of and upon the most conspicuous part of the finished article and its box, crate or covering.

182.14 ENFORCEMENT OF LAW. It shall be the duty of the commissioner of labor statistics and the district attorneys of the several counties to enforce the foregoing section, and when, upon complaint or otherwise, such commissioner has reason to believe that the same has been violated he shall advise the district attorney of the county wherein such alleged violation has occurred, of the fact, giving the information in support of his conclusions, and such district attorney shall at once institute the proper legal proceedings to compel compliance therewith.

Chapter 348. Offenses against property

348.652 PENALTY FOR SELLING SUCH GOODS, ETC. A person knowingly having in his possession for the purpose of sale or offering for sale any convict-made goods, wares or merchandise manufactured in any state except this, without the brand, mark or label required by law, or who removes or defaces such brand, mark or label shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not less one hundred dollars nor more than five hundred dollars.

APPENDIX B

UNITED STATES STATUTES AT LARGE

Vol. 45, p. 1084

CHAP. 79.—An Act

To divest goods, wares, and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that all goods, wares, and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported into any State or Territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such State or Territory be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

SEC. 2. This Act shall take effect five years after the date of its approval.

Approved January 19, 1929.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

IN EQUITY.

No. Original

STATE OF ALABAMA, PLAINTIFF,

vs.

STATE OF ARIZONA ET AL., DEFENDANTS.

AMENDMENT (No. 1) TO BILL OF COMPLAINT.

STATE OF ALABAMA,
BY THOMAS E. KNIGHT, JR.,
Attorney General.

WM. LOGAN MARTIN,
Counsel.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1933

IN EQUITY.

No. Original

STATE OF ALABAMA, PLAINTIFF,

vs.

STATE OF ARIZONA ET AL., DEFENDANTS.

AMENDMENT (No. 1) TO BILL OF COMPLAINT.

Comes the State of Alabama and by leave of the Court first had and received files its amendment (No. 1) to the bill of complaint heretofore deposited with the Clerk as follows:

1. By striking from the bill as parties defendant the States of California, Colorado, Indiana, Iowa, Kentucky, Michigan, Minnesota, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Washington, and Wisconsin.

2. By striking from the bill of complaint page 59 and inserting in lieu thereof the law of the State of Montana as set out on pages 4, 5 and 6 of the return of Montana to the rule to show cause why the bill should not be filed.

STATE OF ALABAMA,
By THOMAS E. KNIGHT, JR.,
Attorney General.

WM. LOGAN MARTIN,
Counsel.

FILE COPY

In the Supreme Court
OF THE
United States

OCTOBER TERM 1932

No. ..... Original

STATE OF ALABAMA,
Complainant,
vs.
STATE OF ARIZONA, ET AL,
Defendants.
} In Equity

RETURN TO RULE TO SHOW CAUSE
and
BRIEF IN SUPPORT OF RETURN TO
RULE TO SHOW CAUSE

ARTHUR T. LAPRADE,
Attorney General of the State of Arizona

INDEX

	Pages
Return	1- 4
Brief in support of return	5-16
Summary statement of case	5- 9
Argument	9-16
1. No constitutional right guaranteed complainant is invaded or violated by defendant	9-12
2. Bill of complaint would invade sovereignty of Arizona in its internal affairs and restrain enforcement of its criminal laws	12-13
3. No case or controversy presented	13-14
4. Misjoinder of causes of action and parties defendant	14-16
Proof of Mailing copy of return and brief	17

TABLE OF CASES

Pages

Adams Express vs. Ky., 214 U. S. 218 12

Albright vs. Board of Commissioners, 194 Pac. 913 (Ks. 1921) 10

Clark Distilling Co. vs. Western Md. Ry. Co., 242 U. S. 311 11

Ex parte La Prade 77 L. Ed., 860 (Oct. term 1932) 13-14-16

Ex parte Young, 209 U. S. 123, 159 13-14-16

Georgia vs. Stanton, 73 U. S. 50 13

Hill vs. Hesterberg, 184 N. Y. 126 12

Hipolite Egg Co. vs. U. S., 220 U. S. 45 11

In re Rahrer, 140 U. S. 545 11-12

Louisiana vs. Texas, 176 U. S. 1, 16 13-16

Oklahoma vs. Gulf Colo. & Santa Fe Ry. Co., 220 U. S. 290, 55 L. Ed. 469 16

Rhodes vs. Iowa, 170 U. S. 412, 420 11-12

Scott vs. Frazier, 258 Fed. 669, 671 10

Silz vs. Hesterberg, 221 U. S. 31 11-12

Wisconsin vs. Pelican Insurance Co., 127 U. S. 265, 32 L. Ed. 239 14-16

CONSTITUTION AND STATUTES CITED

Article 1, Section 8, Constitution of the United States 11-12

Chapter 103, Session Laws Arizona 1933 .... 6, 8-10-11-14

Fourteenth Amendment to Constitution of the United States 10

Hawes-Cooper Act 6, 8, 9-10-11-12

In the Supreme Court
OF THE
United States

OCTOBER TERM 1932

No. ..... Original

STATE OF ALABAMA,
Complainant,
vs.
STATE OF ARIZONA, ET AL,
Defendants.
} In Equity

RETURN TO RULE TO SHOW CAUSE

AND NOW COMES the State of Arizona, one of the defendants above named, appearing by its Attorney General, Arthur T. LaPrade, and makes return to the rule to show cause, entered on the 15th day of May, 1933, why the complainant, State of Alabama, should not be granted leave to file its bill of complaint in the above

entitled matter in accordance with its motion for leave to file said bill of complaint submitted to the above entitled court on the 8th day of May, 1933.

By way of return to the show cause order heretofore referred to, the State of Arizona respectfully submits that complainant's motion for leave to file its bill of complaint should be denied for the following reasons:

I.

It does not appear from the allegations contained in complainant's bill of complaint, sought to be filed, that any constitutional right guaranteed to complainant by the constitution of the United States is violated or threatened with violation by the acts of this defendant or any of its officers.

II.

The effect of the bill of complaint is to invade the sovereignty of this defendant in its internal affairs and to restrain its State courts from enforcing the laws of the State which are criminal in effect.

III.

It appears from the allegations contained in complainant's bill of complaint sought to be filed that no actual case or controversy between complainant and this defendant or any of the defendants above named is presented or exists.

IV.

The bill of complaint sought to be filed shows upon its face a misjoinder of causes of action and of defendants.

WHEREFORE, the State of Arizona prays that complainant's motion for leave to file bill of complaint be denied with costs.

STATE OF ARIZONA

By ARTHUR T. LAPRADE,
Attorney General of the State of Arizona.

In the Supreme Court
OF THE
United States

OCTOBER TERM 1932

No. ..... Original

STATE OF ALABAMA,
Complainant,
vs.
STATE OF ARIZONA, ET AL,
Defendants.
} In Equity

BRIEF IN SUPPORT OF STATE OF ARIZONA'S RETURN TO RULE TO SHOW CAUSE

Summary Statement of Case

The State of Alabama is before this Court on motion for leave to file a bill of complaint against the State of Arizona and many other states similarly situated, which

bill of complaint prays that this Court (Bill of Complaint, pages 25, 26 and 27) declare invalid and inoperative, as to complainant, Chapter 103 Session Laws of Arizona 1933 (Appendix A, Bill of Complaint, pages 29 and 30), and that the Act of Congress approved January 19, 1929, known as the Hawes-Cooper Act (Bill of Complaint, page 77), be decreed by this Court to be in violation of the Constitution of the United States and therefore void and of no effect, and in addition requests this Court to issue an order restraining, pending final hearing of its bill of complaint and perpetually upon final hearing, the State of Arizona and all and several the persons in power under its authority from enforcing or attempting to enforce the provisions of its statute heretofore referred to.

Chapter 103 Session Laws of Arizona 1933, above referred to, reads as follows:

"(House Bill No. 118)

(Regular Session)

AN ACT relating to the sale in the open market of goods, wares and merchandise manufactured, produced or mined by convicts or prisoners.

Be it enacted by the Legislature of the State of Arizona:

Section 1. No goods, wares or merchandise manufactured, produced or prepared wholly or in

part by convicts or convict labor, except convicts or prisoners on parole or probation, shall be sold or exchanged on the open market within the state of Arizona.

Section 2. The sale of goods, wares or merchandise prohibited by Section 1 of this Act shall extend to and apply to all goods, wares or merchandise prepared, produced or manufactured wholly or in part by convicts or prisoners of other states and the same shall be subject to the operation and effect of the laws of this state upon arrival and delivery within the State of Arizona to the same extent and in the same manner as though such goods, wares and merchandise had been manufactured, produced or mined within the State of Arizona, and shall not be exempt by reason of being introduced in the original package or otherwise.

Section 3. It shall be unlawful for any board, commission or officer of the State of Arizona or any of its subdivisions to enter into any contract for the expenditure of any public moneys to be paid for any goods, wares or merchandise prepared or manufactured wholly or in part by convicts or prisoners except convicts or prisoners on parole or probation.

Section 4. Sale upon the open market as outlined in Sections 1 and 2 of this Act shall not include sales or exchanges between any penal or charitable institutions maintained wholly by the State of Arizona or its political subdivisions for use in any of such institutions or by the wards thereof.

Section 5. Any person or any manager or agent for any person or corporation who shall violate the provisions of this Act shall, upon conviction, be punished by a fine of not less than one hundred ($100.00) dollars and not more than one thousand ($1000.00) dollars and by imprisonment in the county jail for a period of not less than ninety (90) days nor more than one (1) year.

Section 6. To preserve the public peace, health and safety, it is necessary that this act shall become immediately operative. It is therefore declared to be an emergency measure, and shall take effect upon its passage in the manner provided by law.

APPROVED MARCH 20, 1933."

The Hawes-Cooper Act, above referred to, reads as follows:

"UNITED STATES STATUTES AT LARGE

Vol. 45, p. 1084

CHAP. 79—An Act

To divest goods, wares, and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain cases.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED that all goods, wares, and

merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported into any State or Territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such State or Territory be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

SEC. 2. This Act shall take effect five years after the date of its approval.

Approved January 19,1929."

Argument in Support of Return to Rule to Show Cause

POINT I.

NO CONSTITUTIONAL RIGHT GUARANTEED COMPLAINANT IS INVADED OR VIOLATED BY DEFENDANT.

The statute of the State of Arizona, hereinabove set forth, and complained of by complainant in its bill of complaint sought to be filed, does not invade any con-

stitutional right guaranteed to the State of Alabama by the Constitution of the United States, and the statute of the State or the conduct of the Legislature in enacting the same does not threaten the violation of any of the constitutional rights guaranteed to the State of Alabama by the Constitution of the United States.

From the allegations contained in complainant's complaint sought to be filed, it appears that complainant complains, in effect, that by the enactment of said Chapter 103 Session Laws of Arizona 1933, the State of Arizona violated the 14th Amendment to the Constitution of the United States insofar as applicable to the complainant. The 14th Amendment to the Constitution of the United States affords no protection to the State of Alabama, and the due process or equal protection clauses thereof cannot be availed of by the State of Alabama:

Scott v. Frazier
258 Federal 669, 671 (Decided 1920 on another point in 253 U. S. 243)

Albright v. Board of Commissioners
194 Pac. 913 (Kans.) 1921

Complainant also alleges in its bill of complaint, (pages 24 to 25) that the act or the law of the State of Arizona, heretofore referred to, and the Act of Congress of January 19, 1929, known as the Hawes-Cooper Act, hereinabove set forth, both conflict with the Commerce Clause of the Constitution of the United States,

under which Congress has power to regulate commerce among the several states (Art. 1, Sec. 8, Cl. 3), in that Congress is without power to impose burdens on commerce among the states except where it deals with activities or objects harmful to the public health, morals or welfare, and in that said laws of the several defendants impose burdens on the transportation in interstate commerce of goods made in the prisons of complainant.

The Act of Congress, known as the Hawes-Cooper Act, heretofore referred to, does not violate in any respect the Interstate Commerce Clause of the Constitution of the United States (Art. 1, Sec. 8, Cl. 3), and it does not constitute an imposition of an invalid burden upon the commerce among the states but is instead the proper exercise of the regulatory power of Congress over interstate commerce:

In re Rahrer
140 U. S. 545 (1891)

Rhodes v. Iowa
170 U. S. 412, 420 (1898)

Clark Distilling Co. v. Western Md. Ry. Co.
242 U. S. 311 (1917)

Silz v. Hesterberg
211 U. S. 31 (1908)

Hipolite Egg Co. v. United States
220 U. S. 45

The provisions of Chapter 103 Session Laws of Arizona 1933, place no greater degree of restriction upon

the sale in Arizona of Alabama prison-made goods than it does upon the sale of such goods made in the state of Arizona or other states, and when read in conjunction with the Act of Congress of January 19, 1929, known as the Hawes-Cooper Act, supra, it does not violate any of the provisions of the Interstate Commerce Clause (Art. 1, Sec. 8, Cl. 3) of the Constitution of the United States:

In re Rahrer
140 U. S. 545 (1891)

Rhodes v. Iowa
170 U. S. 412, 420 (1898)

Silz v. Hesterberg
211 U. S. 31 (1908)

Adams Express v. Kentucky
214 U. S. 218

Hill v. Hesterberg
184 N. Y. 126

POINT II.

BILL OF COMPLAINT WOULD INVADE SOVEREIGNTY OF ARIZONA IN ITS INTERNAL AFFAIRS AND RESTRAIN ENFORCEMENT OF ITS CRIMINAL LAWS.

Complainants' motion for leave to file its bill of complaint should be denied because the effect of said bill of complaint is to invade the sovereignty of the State

of Arizona in its internal affairs and to restrain the State courts of Arizona from the enforcement of the State laws which are criminal in effect. Such a bill of complaint should not be entertained:

Ex parte Young
209 U. S. 123, 159

Ga. v. Stanton
73 U. S. 50

POINT III.

NO CASE OR CONTROVERSY PRESENTED.

The allegations contained in the plaintiff's bill of complaint sought to be filed do not present a case or controversy between the State of Alabama and the State of Arizona. There is not set forth in said bill of complaint any act or omission to act on the part of the State of Arizona with reference to any matter or thing involving property of the State of Alabama, or a denial of any valid request by the State of Alabama to the State of Arizona which gives rise to a justiciable controversy between the State of Alabama and the State of Arizona, and for this reason the Court should not entertain complainant's bill of complaint:

La. v. Texas
176 U. S. 1, 16

Ex parte LaPrade
77 L. Ed. 860 (Oct. Term 1932)

Wis. v. Pelican Insurance Co.
127 U. S., 265
32 L. Ed. 239.

Before the complainant may be entitled to the equitable relief prayed for in its bill of complaint, it must allege that the State of Arizona or its officers threatened or intended to do some act toward the enforcement of its statute, Chapter 103 Session Laws of Arizona 1933, against the complainant:

Ex parte LaPrade
77 L. Ed. 860 (Oct. Term 1932)

Ex parte Young
209 U. S. 123

Should the complainant violate the provisions of Chapter 103 Session Laws of Arizona 1933, it is possible that the State of Arizona and its officers might regard its statute as unconstitutional and refrain from any effort to enforce its provisions against complainant.

POINT IV.

MISJOINDER OF CAUSES OF ACTION AND PARTIES DEFENDANT.

It appears upon the face of complainant's bill of complaint, which it seeks to file, that there is a misjoinder of causes of action and of defendants, in that there are separate classes of statutes in force in the

eighteen defendant states, differing in the manner of control or restriction of prison-made goods. The variation among those classes of statutes may be observed by examination of paragraph 12 of the bill of complaint, at page 16, which reads as follows:

> "In the defendant states of California, Colorado, Iowa, Kentucky, Minnesota, Montana, New Jersey, Ohio, Oklahoma, Oregon, Washington and Wisconsin, there are in effect at this time laws requiring prison-made goods to be labeled or branded; and in the states of Idaho, Indiana, Michigan, New York, North Carolina and Pennsylvania, laws have been recently enacted effective January 19, 1934, forbidding the sale of such goods; and in the State of Arizona a law has been recently enacted and now is in effect forbidding the sale of prison-made goods; all such laws of the defendant states being set out hereinafter as Appendix A and made a part hereof."

and see pages 29 to 76 of the bill of complaint.

There is also a misjoinder of causes of action and defendants for the reason that nowhere in the bill of complaint is it alleged that all of the defendant states, jointly acting, or this defendant, the State of Arizona or any of its officers acting individually, intend or threaten to enforce the laws of their states or of this State complained of in said bill of complaint; that is, there is an absolute failure on the part of complainant to allege an existing case or controversy between the State of Ala-

bama and the defendant states or the State of Arizona which would permit complainant to file its bill of complaint with this Court:

La. v. Texas
176 U. S. 1

Wis. v. Pelican Ins. Co.
127 U. S. 265

Okla. v. Gulf, Colo. & Santa Fe Ry. Co.
220 U. S. 290
55 L. Ed. 469

Ex parte LaPrade
77 L. Ed. 860 (Oct. Term 1932)

Ex parte Young
209 U. S. 123

IT IS THEREFORE respectfully submitted by this defendant, the State of Arizona, that complainant's motion for leave to file bill of complaint be denied.

Respectfully submitted,

STATE OF ARIZONA

By ARTHUR T. LAPRADE,
Attorney General of the State of Arizona.

PROOF OF MAILING COPIES OF RETURN AND BRIEF IN SUPPORT THEREOF.

STATE OF ARIZONA
COUNTY OF MARICOPA } ss.

Before the undersigned authority personally appeared James R. McDougall, who being first duly sworn upon oath deposes and says that on September 29, 1933 he deposited in the United States post office in the City of Phoenix, Arizona, in a sealed envelope, with postage prepaid, by registered mail, a true printed copy of the foregoing return and brief in support of return to the rule to show cause, addressed to Thomas E. Knight, Jr., Attorney General of Alabama, Attorney General's office, Montgomery, Alabama.

J. R. McDougall

J. R. McDougall.

Subscribed and sworn to before me this 29th day of September, 1933.

Notary Public.

My commission expires July 25 1937

(Seal)

FILE COPY COPY

No. Original

In Equity

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1932

STATE OF ALABAMA,
Plaintiff,

vs.

STATE OF ARIZONA ET AL.,
Defendants.

RETURN SUBMITTED ON BEHALF OF THE STATE OF CALIFORNIA ON APPLICATION OF STATE OF ALABAMA FOR PERMISSION TO FILE BILL OF COMPLAINT.

U. S. WEBB, Attorney General
of the State of California.

W. R. AUGUSTINE,
Deputy Attorney General
Of Counsel for the State of California.

CALIFORNIA STATE PRINTING OFFICE

No. Original

In Equity

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1932

STATE OF ALABAMA,
Plaintiff,

vs.

STATE OF ARIZONA ET AL.,
Defendants.

RETURN SUBMITTED ON BEHALF OF THE STATE OF CALIFORNIA ON APPLICATION OF STATE OF ALABAMA FOR PERMISSION TO FILE BILL OF COMPLAINT.

Now comes the State of California and in return to the rule to show cause, issued on the fifteenth

day of May, 1933, why leave to file the bill of complaint should not be granted, respectfully submits that:

I

No constitutional right guaranteed to Alabama by the Constitution of the United States is violated or threatened with violation by the acts alleged in the bill of complaint sought to be filed.

(a) A State is not a "person" within the meaning of the "due process" and "equal protection" clauses of the Fourteenth Amendment.

Scott vs. *Frazier,* 258 Fed. 669, reversed on other grounds, 40 S. Ct. 503, 253 U. S. 243, 64 L. Ed. 883;
Albright vs. *Bd. of Commissioners,* 194 Pac. 913 (1921) Kansas.

(b) The Hawes-Cooper Act (45 Stat. 1084) does not violate the commerce clause of the Constitution (Article I, Sec. 8, Clause 3), nor does it impose an invalid burden upon commerce among the States. It is proper exercise of the regulatory power of Congress over interstate commerce.

In re Rahrer, 140 U. S. 545 (1891);
Rhodes vs. *Iowa,* 170 U. S. 412 (1898);
Clark Distilling Co. vs. *Western Md. R. R. Co.,* 242 U. S. 311 (1917);
Seaboard Airline Ry. vs. *North Carolina,* 245 U. S. 298.

(c) The provisions of the California statute, Statutes of California 1929, Chapter 881, page 1962, set forth at page 31 of the complaint will be superseded by the provisions of Chapter 636, Statutes 1933, when the Hawes-Cooper Act becomes effective. Said 1933 statute reads as follows:

"CHAPTER 636.

An act regulating and restricting the sale of goods, wares and merchandise manufactured, produced or mined by convicts or prisoners or in penal or reformatory institutions and prescribing penalties for violation of the provisions hereof.

(Approved by the Governor June 2, A. D. 1933.)

The people of the State of California do enact as follows:

SECTION 1. To the extent and in so far as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress, and particularly under the provisions of the act of Congress approved January 19, 1929, and entitled 'An act to divest goods, wares, and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain cases,' all goods, wares and merchandise manufactured, produced or mined wholly or in part by convicts or prisoners (except convicts or prisoners on parole or probation) or manufactured, produced or mined wholly or in part in any penal and/or

reformatory institution, transported into the State of California and remaining herein for use, consumption, sale or storage, shall upon arrival and delivery in this State be subject to the operation and effect of the laws of this State to the same extent and in the same manner as though such commodities had been manufactured, produced or mined in this State by convicts or prisoners or in any penal and/or reformatory institution, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

SEC. 2. No person or corporation may sell, expose for sale or offer for sale any goods, wares or merchandise manufactured, produced or mined wholly or in part by convicts or prisoners (except convicts or prisoners on parole or probation) or manufactured, produced or mined wholly or in part in any penal and/or reformatory institution, the sale of which is not specifically sanctioned by law; and any person or corporation violating any provision of this section is guilty of a misdemeanor.

SEC. 3. This act shall take effect and become operative immediately upon the act cited in section 1 hereof becoming effective and operative."

California stipulates that this statute may be read into the complaint together with Chapter 881, Statutes of 1929, set forth at pages 31, *et seq.* thereof.

(NOTE.—The only prison products the sale of which are "specifically sanctioned by law," except sales for governmental use, are crushed rock (Stats. of California 1895, Chap. 208) and products of the jute mill at San Quentin State Prison (Statutes of California 1927, Chap. 637, as amended by Statutes 1931, Chap. 270). Such jute products are sold by prison authorities to consumers between certain times of the year and to any one at other times if a surplus remains unsold.)

The said statute of 1933 (Stats. 1933, Ch. 636, above quoted in full) read in conjunction with the Hawes-Cooper Act (45 Stat. 1084) does not violate the provisions of Article I, Section 8, Clause 3, of the Constitution of the United States.

In re Rahrer, supra;
Rhodes vs. *Iowa, supra;*
Silz vs. *Hesterberg,* 211 U. S. 31;
Adams Express Co. vs. *Kentucky,* 214 U. S. 218;
Arnold vs. *Yanders,* 56 Ohio State 417; 47 N. E. 50.

II

The granting of the relief sought by the bill of complaint would invade the sovereignty of the State of California in its internal affairs and restrain the State in the enforcement of its laws, criminal in effect.

Ex parte Young, 209 U. S. 123;
Georgia vs. *Stanton,* 73 U. S. 50.

III

No justiciable controversy between States is herein presented.

Louisiana vs. *Texas,* 176 U. S. 1.

It does not appear that Alabama has suffered a wrong furnishing ground for judicial redress or is asserting a right susceptible of judicial enforcement. The mere fact that a State is the plaintiff is not enough.

Florida vs. *Mellon,* 273 U. S. 12;
Wisconsin vs. *Pelican Ins. Co.,* 127 U. S. 265.

IV

The bill of complaint presents upon its face a misjoinder of causes of action and of defendants.

(a) The various statutes in force in the nineteen defendant States differ in form and in manner of control or restriction of prison made products.

(b) No joint action is set forth which would warrant a joinder of the defendants.

V

The bill of complaint fails to state a cause of action against the said defendants or any of them.

Wherefore, the State of California prays

(1) that the motion for leave to file the bill of complaint be denied;

(2) that in the event this Honorable Court shall grant the motion, the State of California be permitted to file an answer thereto and to present its

evidence in the proper manner or make such other and further motion as may be deemed proper in the premises.

U. S. WEBB,
Attorney General of the State of California.

W. R. AUGUSTINE,
Deputy Attorney General,
Of Counsel for the State of California.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1932

No....., Original

STATE OF ALABAMA, *Plaintiff,* vs. THE STATES OF ARIZONA, CALIFORNIA, COLORADO, IDAHO, INDIANA, IOWA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, WASHINGTON, AND WISCONSIN, *Defendants.*	**In Equity**

SEPARATE RETURN SUBMITTED ON BEHALF OF THE STATE OF COLORADO ON APPLICATION OF THE STATE OF ALABAMA FOR PERMISSION TO FILE BILL OF COMPLAINT.

PAUL P. PROSSER,
Attorney General,
NORRIS C. BAKKE,
Deputy Attorney General,
ALLEN MOORE,
Assistant Attorney General,
Attorneys for the State of Colorado.

Clark QUICK-PRINTING Company, Lawrence 1332-34, Denver, Colo.

INDEX.

	Pages
Statement	1-2
Argument	2-6
I. No constitutional right guaranteed to Alabama by the Constitution of the United States is violated or threatened with violation by the Acts alleged in the bill of complaint sought to be filed	2-5
II. The effect of the bill of complaint is to invade the sovereignty of the State of Colorado in its internal affairs and to restrain in State courts the enforcement of State laws criminal in effect	5
III. No actual controversy between States is herein presented	5
IV. The bill of complaint presents upon its face a misjoinder of causes of action and of defendants	5
V. There is now pending in the New York State Supreme Court, Albany County, an action in equity, entitled "Harry Greenthal v. John J. Bennett, Jr., as Attorney-General of the State of New York," which seeks to restrain the enforcement of both Ch. 26, L. 1933 of New York and the Act of Congress of Jan. 19, 1929 (Hawes-Cooper Act), 45 Stat. 1084 on the ground that both represent unconstitutional interferences with interstate commerce	6
Conclusion	6
Proof of Mailing Copies of Return of Brief	7

TABLE OF CASES.

	Pages
Adams Express v. Kentucky, 214 U. S. 218	5
Albright v. Bd. of Comm'rs., 194 Pac. 913 (1921)	2
Clark Distilling Co. v. Western Md. R. R. Co., 242 U. S. 311 (1917)	2
Ex parte Young, 209 U. S. 123	5
Georgia v. Stanton, 73 U. S. 60	5
Greenthal v. Bennett, New York State Supreme Court, Albany County (pending)	6
Hill v. Hesterberg, 134 N. Y. 126	5
Hipolite Egg Co. v. U. S., 220 U. S. 45	2
In re Rahrer, 140 U. S. 545 (1891)	2, 5
Louisiana v. Texas, 176 U. S. 1	5
Rhodes v. Iowa, 170 U. S. 412 (1898)	3, 5
Scott v. Frazier, 253 Fed. 669	2
Sils v. Hesterberg, 211 U. S. 31 (1908)	2, 5

CONSTITUTIONAL PROVISIONS AND STATUTES CITED.

	Pages
Compiled Laws of Colorado, 1921:	
Section 3752	3, 4
Section 3753	3, 4
Section 3754	3, 4
Section 3755	3, 4
Constitution of the United States:	
Art. I, Sec. 8	2, 5
Fourteenth Amendment	2
Hawes-Cooper Act, 45 Stat. 1084	2, 5, 6
Laws of New York:	
1933, Chapter 26	6
Session Laws of Colorado:	
1933, Chapter 53	3, 4

IN THE

Supreme Court of the United States

October Term, 1932

No....., Original

STATE OF ALABAMA, *Plaintiff,* vs. THE STATES OF ARIZONA, CALIFORNIA, COLORADO, IDAHO, INDIANA, IOWA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, WASHINGTON, AND WISCONSIN, *Defendants.*	In Equity

SEPARATE RETURN SUBMITTED ON BEHALF OF THE STATE OF COLORADO ON APPLICATION OF THE STATE OF ALABAMA FOR PERMISSION TO FILE BILL OF COMPLAINT.

And now comes the State of Colorado, and in return to the order to show cause under date of the fifteenth day of May, 1933, why leave to file the bill of complaint against the said State of Colorado should not be granted, says:

The State of Colorado does not object to a determination upon the merits of the controversy sought to be

adjudicated by the petition herein, nor does the State of Colorado desire to interpose needless obstacles to such result. There are, however, considerations of consequence which weigh heavily against the granting of the petition herein and against a determination of the issues on the basis of the complaint herein. Briefly stated, these considerations are:

I. *No constitutional right guaranteed to Alabama by the Constitution of the United States is violated or threatened with violation by the acts alleged in the bill of complaint sought to be filed.*

(a) The Fourteenth Amendment to the Constitution of the United States does not encompass the State of Alabama as such within its protection, and the due process or equal protection clauses thereof may not be availed of by the State of Alabama.

Scott v. Frazier, 258 Fed. 669, 671. (Decided, 1920, on another point in 253 U. S. 243.)
Albright v. Bd. of Comm'rs, 194 Pac. 913 (1921)—Kansas.

(b) The Act of Congress of Jan. 19, 1929, 45 Stat. 1084 (Complaint, p. 77), known as the Hawes-Cooper Act, does not violate the interstate commerce clause of the Constitution of the United States (Art. I, Sec. 8, Cl. 3), nor does it constitute an imposition of an invalid burden upon commerce among the States. It is a proper exercise of the regulatory power of Congress over interstate commerce.

In re Rahrer, 140 U. S. 545 (1891).
Rhodes v. Iowa, 170 U. S. 412, 420 (1898).
Clark Distilling Co. v. Western Md. R. R. Co., 242 U. S. 311 (1917).
Silz v. Hesterberg, 211 U. S. 31 (1908).
Hipolite Egg Co. v. U. S., 220 U. S. 45.

(c) Secs. 3752, 3753, 3754 and 3755, Compiled Laws of Colorado, 1921, set forth in plaintiff's bill of complaint, Appendix A, pp. 35-37, have been specifically repealed, by Sec. 4 of Chapter 53, Session Laws of Colorado, 1933, but the provisions of said Chapter 53, Session Laws of Colorado, 1933, with the exception of governmental use, place no greater degree of restriction upon the sale in Colorado of Alabama prison made goods than upon those of Colorado or other States.

Chapter 53, Session Laws of Colorado, 1933, reads as follows:

> "AN ACT CONCERNING GOODS, WARES OR MERCHANDISE MANUFACTURED, PRODUCED OR MINED, WHOLLY OR IN PART, BY CONVICTS OR PRISONERS.
>
> "*Be It Enacted by the General Assembly of the State of Colorado:*
>
> "Section 1. It shall be unlawful for any person or persons or corporation to use, consume, sell or store in this state, goods, wares or merchandise manufactured, produced or mined, wholly or in part, by convicts or prisoners in any penal and/or reformatory institution in this state, but the provisions of this section shall not apply to the use, consumption, sale or storage of such goods, wares or merchandise by the state or any political subdivision thereof or by any public institution or agency owned, controlled or managed by the state or by any political subdivision thereof, under the provisions of such laws as are now or may hereafter be enacted; nor shall the provisions of this section apply to goods, wares or merchandise manufactured, produced or mined by convicts or prisoners on parole or probation.

"Section 2. All goods, wares and merchandise manufactured, produced or mined, wholly or in part, by convicts or prisoners in any penal and/or reformatory institutions, transported into this state and remaining herein for use, consumption, sale or storage, shall, upon arrival and delivery in this state, be subject to the operation and effect of the provisions of this act to the same extent and in the same manner as though such goods, wares and merchandise had been manufactured, produced or mined in the penal institutions of this state, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise. The provisions of this section shall not apply to goods, wares or merchandise manufactured, produced or mined by convicts or prisoners on parole or probation.

"Section 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment in the discretion of the court.

"Section 4. Sections 3745 to 3755, both inclusive, Compiled Laws of Colorado, 1921, and all Acts or parts of Acts in conflict herewith are hereby repealed.

"Approved April 20, 1933."

Colorado stipulates that this statute may be read into the complaint in lieu of Secs. 3752, 3753, 3754 and 3755, Compiled Laws of Colorado, 1921, set forth at pp. 35-37 thereof.

(d) Chapter 53, Session Laws of Colorado, 1933, read in conjunction with the Act of Congress of January 19,

1929, 45 Stat. 1084, does not violate the provisions of Art. I, Sec. 8 of the Constitution of the United States.

In re Rahrer, 140 U. S. 545.
Rhodes v. Iowa, 170 U. S. 412.
Silz v. Hesterberg, 211 U. S. 31.
Adams Express v. Kentucky, 214 U. S. 218.
Hill v. Hesterberg, 184 N. Y. 126.

II. *The effect of the bill of complaint is to invade the sovereignty of the State of Colorado in its internal affairs and to restrain in State courts the enforcement of State laws, criminal in effect.*

Ex parte Young, 209 U. S. 123, 159.
Georgia v. Stanton, 73 U. S. 60.

III. *No actual controversy between States is herein presented.*

(a) No act or omission to act regarding any matter or thing involving property of Alabama, or denial of any valid request by Alabama, giving rise to a justiciable controversy is set forth.

Louisiana v. Texas, 176 U. S. 1, 16.

IV. *The bill of complaint presents upon its face a misjoinder of causes of action and of defendants.*

(a) There are separate classes of statutes in force in the eighteen defendant States, differing in the manner of control or restriction of prison made products. Variations among those classes of statutes are observed.

Bill—Appendix A—pp. 29-76.
Bill—Paragraph 12—p. 16.

(b) No joint action or enforcement is set forth which might possibly warrant the joinder of the defendants.

V. *There is now pending in the New York State Supreme Court, Albany County, an action in equity, entitled "Harry Greenthal v. John J. Bennett, Jr., as Attorney-General of the State of New York," which seeks to restrain the enforcement of both Ch. 26, L. 1933 of New York and the Act of Congress of Jan. 19, 1929 (Hawes-Cooper Act) 45 Stat. 1084 on the ground that both represent unconstitutional interferences with interstate commerce.*

(a) This said case presents a real controversy, identical in effect with the bill of complaint herein, and which will probably be carried on appeal or writ of certiorari to this Court. Argument has been heard at Special Term, and decision is being awaited.

(b) The several states defendant in the instant petition may be heard to join by submission of Amicus Curiae briefs in said action, or may await individual test in proper manner.

The State of Colorado, in submitting this memorandum, does not desire to be understood as opposing a hearing upon the merits of the controversy sought to be presented by the petition and bill of complaint of Alabama herein. In the event that this honorable Court shall determine to permit the bill to be filed, Colorado begs leave to file an answer thereto and to present its evidence in proper manner to the end that the issues may be fairly adjudicated and speedily determined.

If this honorable Court shall decide that the petition and bill of complaint present no cause of action on the merits, the State of Colorado prays a denial of the petition with costs.

Respectfully submitted,

PAUL P. PROSSER,
Attorney General,
NORRIS C. BAKKE,
Deputy Attorney General,
ALLEN MOORE,
Assistant Attorney General,
Attorneys for the State of Colorado.

PROOF OF MAILING COPIES OF RETURN OF BRIEF IN SUPPORT THEREOF.

STATE OF COLORADO,
CITY AND COUNTY OF DENVER } ss.

Before the undersigned authority, personally appeared Pierpont Fuller, Jr., who, being first duly sworn, upon oath deposes and says that on October 5th, 1933, he deposited in the United States Post Office in the City of Denver, Colorado, in a sealed envelope, with postage prepaid, by registered mail, a true printed copy of the foregoing return and brief in support of return to the rule to show cause, addressed to Thomas E. Knight, Jr., Attorney General of Alabama, Attorney General's Office, Montgomery, Alabama.

ORIGINAL CERTIFIED

.....
PIERPONT FULLER, JR.

Subscribed and sworn to before me this 5th day of October, 1933.

.....
Notary Public.

My commission expires.....

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. ..... ORIGINAL

STATE OF ALABAMA, *Plaintiff*,

vs.

THE STATES OF ARIZONA, CALIFORNIA, COLORADO, IDAHO, INDIANA, IOWA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, WASHINGTON, AND WISCONSIN, *Defendants*,

In Equity.

RETURN OF THE STATE OF IDAHO

to Rule to Show Cause why leave to file Bill of Complaint heretofore tendered should not be granted to Plaintiff, the State of Alabama.

BYRD-RICHARDSON PRINTING CO., INC., BOISE

AUTHORITIES CITED

Page

Albright vs. Board of Commissioners, 194 Pac. 913 9
Atchison, T. & S. F. R. vs. Railroad Commission of the State of California, 75 L. Ed. 1125, 1127, 283 U. S. 380 8
Atkin vs. Kansas, 191 U. S. 207, 48 L. Ed. 148 11

Board of Commissioners, Albright vs., 194 Pac. 913 9
Bolognesi vs. United States, 189 Fed. 835 10
Bowman vs. Chicago, 125 U. S. 465, 8 S. Crt. 689, 1062, 31 L. Ed. 700 .. 6
Buttfield vs. Stranahan, 192 U. S. 470, 24 S. Crt. 349, 48 L. Ed. 525 8

Central National Bank, U. S. vs., 6 Fed. 134 10
Chicago, Bowman vs., 125 U. S. 465, 8 S. Crt. 689, 1062, 31 L. Ed. 700 . 6
Clark Distilling Co. vs. Western Maryland Etc., 242 U. S. 311, 61 L. Ed. 326 ..... 9, 12, 13
Colorado, Kansas vs., 206 U. S. 46, 85, 51 L. Ed. 956 12
Cooke vs. United States, 23 L. Ed. 237, 243 10

12 C. J. 83 8
12 C. J. 887-890 and authorities under Note 89, 12 C. J. 890 11
21 C. J. 217, Par. 216 10
89 C. J. 969 and cases cited under Note 77 14
7 Ency. Sup. Crt. Rep. 820 10
11 Ency. Sup. Crt. Rep. 796, See cases under Notes 98 and 1 12
11 Ency. Sup. Crt. Rep. 797-798 12

Fitts vs. McGhee, 172 U. S. 516, 19 Sup. Crt. 269, 43 L. Ed. 535 14
Frazier, Scott vs., 258 Fed. 669, 671 9
Freed, Weber vs., 224 Fed. 355 8

Garfield, Louisiana vs., 53 L. Ed. 92 12
Georgia vs. Stanton, 73 U. S. 60 12
Gilmore, Nims vs., 17 Idaho 614, 107 Pac. 79 14
Gould, U. S. vs., 25 F. Cas. No. 15, 239 8

Hardin, Leisy vs., 135 U. S. 100, 10 S. Crt. 681, 34 L. Ed. 128 8
Heim vs. McCall, 239 U. S. 175, 36 S. Crt. 78, 60 L. Ed. 206 11
Hesterberg, Silz vs., 211 U. S. 31 9
Hitchcock, Minnesota vs., 185 U. S. 373, 46 L. Ed. 954 12
Hitchcock, Oregon vs., 202 U. S. 60, 50 L. Ed. 935 12
Hunter, Martin vs., 1 Wheat. 304, 4 L. Ed. 97 15
Hipolite Egg Co. vs. U. S., 220 U. S. 45 9

Kansas, Atkin vs., 191 U. S. 207, 48 L. Ed. 148 11
Kansas vs. Colorado, 206 U. S. 46, 85, 51 L. Ed. 956 12
Kansas vs. United States, 204 U. S. 331, 341, 51 L. Ed. 510 12
Kentucky, Louisville vs., 161 U. S. 677, 40 L. Ed. 849 15

Leisy vs. Hardin, 135 U. S. 100, 10 S. Crt. 681, 34 L. Ed. 128 8
Louisiana vs. Garfield, 53 L. Ed. 92 12
Louisiana vs. McAdoo, 58 L. Ed. 1506 12
Louisiana vs. Texas, 176 U. S. 1, 16 14
Louisville vs. Kentucky, 161 U. S. 677, 40 L. Ed. 849 15

McAdoo, Louisiana vs., 58 L. Ed. 1506 12
McCall, Heim vs., 239 U. S. 175, 36 S. Crt. 78, 60 L. Ed. 206 11
McGhee, Fitts vs., 172 U. S. 516, 19 S. Crt. 269, 43 L. Ed. 535 14
Manila, Vilas vs., 220 U. S. 345, 55 L. Ed. 491, 495 10
Martin vs. Hunter, 1 Wheat. 304, 4 L. Ed. 97 15
Massachusetts vs. Mellon, 262 U. S. 447, 43 S. Crt. Rep. 597, 67 L. Ed. 1078, 1084 7
Massachusetts, Thurlow vs., 5 How. 504, 12 L. Ed. 256 8

Page

Mellon, Massachusetts vs., 262 U. S. 447, 43 S. Ct. Rep. 597, 67 L. Ed. 1078, 1084 9
Minnesota vs. Hitchcock, 185 U. S. 373, 46 L. Ed. 954 13
Missouri Pac. R. Co., U. S. vs., 78 L. Ed. 222, 48 S. Ct. 133 14

Nashville Etc., U. S. vs., 80 L. Ed. 51, 53 13
National Exchange Bank vs. U. S., 151 Fed. 402, 411 16
Nims vs. Gilmore, 17 Idaho 614, 107 Pac. 79 14

Oregon vs. Hitchcock, 202 U. S. 60, 50 L. Ed. 935 13

Penna. vs. Wheeling Bridge Co., 18 How. 421, 15 L. Ed. 435 13
Popper, U. S. vs., 98 Fed. 423 (cited with approval in Hoke vs. U. S., 57 L. Ed. 523, 33 S. Ct. 281, 283) 5

In Re Rahrer, 140 U. S. 545, 35 L. Ed. 572 ..... 8, 9
Railroad Commission of the State of California, Atchison, T. & S. F. R. vs., 75 L. Ed. 1123, 1137, 283 U. S. 380 8

In Re Sawyer, 124 U. S. 200, 8 S. Ct. 482, 31 L. Ed. 402 14
Silz vs. Hesterberg, 211 U. S. 31 6
Scott vs. Frazier, 156 Fed. 669, 671 6
South Carolina vs. United States, 199 U. S. 437, 50 L. Ed. 261 10

The Siren, 7 Wall. 152, 19 L. Ed. 129 12
Stanton, Georgia vs., 73 U. S. 50 13
Strunahan, Buttfield vs., 152 U. S. 470, 24 S. Ct. 349, 48 L. Ed. 526 6

Texas, Louisiana vs., 176 U. S. 1, 16 14
Thurlow vs. Massachusetts, 5 How. 504, 12 L. Ed. 256 6

Union P. R.R. Co. vs. United States, 99 U. S. 700, 25 L. Ed. 496 15
United States, Bolognesi vs., 139 Fed. 236 10
U. S. vs. Central National Bank, 6 Fed. 134 10
United States, Cooke vs., 22 L. Ed. 237, 243 10
U. S. vs. Gould, 25 F. Cas. No. 15, 249 5
U. S., Hipolite Egg Co. vs., 220 U. S. 45 9
U. S., Kagama vs., 204 U. S. 221, 241, 51 L. Ed. 616 12
U. S. vs. Nashville, Etc., 80 L. Ed. 51, 53 10
U. S. vs. Missouri Pac. R. Co., 78 L. Ed. 222, 48 S. Ct. 133 14
U. S., National Exchange Bank vs., 151 Fed. 402, 411 16
United States, So. Carolina vs., 199 U. S. 437, 50 L. Ed. 261 10
United States, Union P. R.R. Co. vs., 99 U. S. 700, 25 L. Ed. 496 15
U. S. vs. Popper, 98 Fed. 423 (cited with approval in Hoke vs. U. S., 57 L. Ed. 523, 33 S. Ct. 281, 283) 5

Vilas vs. Manila, 220 U. S. 345, 55 L. Ed. 491, 495 10

Weber vs. Freed, 224 Fed. 355 5
Western Maryland R. R. Co., Clark Distilling Co. vs., 242 U. S. 311 9
Wheeling Bridge Co., Penna. vs., 18 How. 421, 15 L. Ed. 435 15

Ex Parte Young, 209 U. S. 123, 159 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. ..... ORIGINAL

STATE OF ALABAMA, *Plaintiff*,

vs.

THE STATES OF ARIZONA, CALIFORNIA, COLORADO, IDAHO, INDIANA, IOWA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, WASHINGTON, AND WISCONSIN, *Defendants*,

In Equity.

RETURN OF THE STATE OF IDAHO

to Rule to Show Cause why leave to file Bill of Complaint heretofore tendered should not be granted to Plaintiff, the State of Alabama.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes the State of Idaho, one of the defendant states of the United States of America, in the above entitled action, by Bert H. Miller, its Attorney General,

and respectfully shows to the Honorable the Supreme Court of the United States its objections to the granting of leave to file the Plaintiff's Bill of Complaint heretofore tendered.

For clarity the State of Idaho submits the following:

STATEMENT

As relates to the State of Idaho there are but two statutes involved. They are, respectively, the so-called Hawes-Cooper Act of Congress, approved January 19th, 1929, appearing at 45 Statutes at Large 1084, and hereinafter set forth as Appendix A; and Chapter 216, Idaho Session Laws (1933), hereinafter set forth as Appendix B.

The tenor of the Hawes-Cooper Act is in substance that prison-produced commodities be divested of their interstate character and subjected to the laws of the various states in the degree only that similar commodities produced locally are controlled.

Adopting so far as might be the language of the Hawes-Cooper Act, and to become effective at the same date (January 19th, 1934), the Idaho 1933 Legislature forbade the general sale or exchange of prison-made commodities on the open market, whether imported or produced locally, and restricted prison production to such as might satisfy the institutional needs of the state and its subdivisions. The Idaho Act may be said concisely to be prohibitory and penal.

An inspection of the bill of complaint tendered appears to disclose only two major grounds for the action of the State of Alabama:

1. It is claimed that the Hawes-Cooper Act and the Idaho Act (among others) are violative of the provisions of Article 1, Section 8, Clause 3 (the interstate commerce clause) of the United States Constitution.

2. It is averred that great financial burdens are imposed upon the taxpayers of the State of Alabama, particularly in that they must provide adequate occupation for prison inmates.

To the filing of the bill of complaint, the State of Idaho finds and submits the following particular objections:

I

There is a misjoinder of causes of action and parties defendant in the complaint, upon its face, in this:

A. There are eighteen states joined as defendants with the State of Idaho, none of which has enacted the same law as the State of Idaho, either in substance or effect, except the State of Michigan, in which state, except for the reservation that its act shall not apply to industries in which there is no existing competitive industry, the act is the same in effect. The differences between the laws of the other defendant states and the laws of the State of Idaho, are differences of both substance, effect, and legal theory, and, among others, in the following particulars:

1. The Act of the State of Indiana, Sections 8262 to 8272, Burns Annotated Indiana Statutes of 1914, and Chapter 269, Laws of 1933 (set forth at pages 42 to 47, Appendix A, of plaintiff's Bill of Complaint) requires the posting of a five thousand dollar bond, and the payment of a five hundred dollar license fee to the state annually,

and is clearly a revenue and regulatory measure as distinguished from a prohibitory measure.

2. Twelve only of the defendant states require branding.

3. California, Oregon and Washington require disinfection or sterilization under the direction of health boards.

4. The California Act discriminates between prison-produced commodities imported and those manufactured in California, by excepting California produced goods from the Act (Bill, p. 34).

5. The Indiana Act is limited to future contracts, and expressly exempts existing contracts from its operation (Bill, p. 46).

6. The Kentucky Act requires the conspicuous labeling of vehicles conveying prison-made goods (Bill, p. 52).

It is obvious that the defenses available to the various states are widely divergent in character; that the enforcement of regulatory acts is entirely distinct from total prohibition, and consequently that there can exist no joint operation or mutual enforcement effort justifying joinder of the defendant states.

II

In its fundamental aspects the bill of complaint tendered is brought by the plaintiff in the interests of the citizens of Alabama and the Gordon East Coast Company (Bill, p. 13), to whom it appears the Act of Congress

will become burdensome by the now prospective imposition of increased taxation. It cannot well be doubted that such actions may in some cases be maintained (See Missouri vs. Illinois, 180 U. S. 208, 241, 45 L. Ed. 497, 512, 21 Sup. Ct. Rep. 331). But, as against an Act of Congress, the state is powerless to bring such a proceeding for the reason:

A. That the United States is the entity standing in the relation of parens patriae in such cases. It has been recently declared by this Court that it cannot be conceded that a state, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. In that field it is the United States alone, and not the state, which represents them as parens patriae.

Massachusetts vs. Mellon, 262 U. S. 447, 43 S. Crt. Rep. 597, 67 L. Ed. 1078, 1084.

III

To justify this proceeding, it must appear that the Congress of the United States, to whom the regulation of commerce between the states is committed (Constitution, Article 1, Section 8, Clause 3) has exceeded its power in divesting certain commodities of their interstate character. But it is the well established rule:

A. That the Congress of the United States is empowered to circumscribe its regulation of interstate commerce and limit its occupancy of that field.

Atchison, T. & S. F. R. vs. Railroad Commission of the State of California, 75 L. Ed. 1128, 1137, 283 U. S. 380.

B. That in pursuance of its power to circumscribe and limit the field which it will occupy in interstate commerce, the Congress is empowered to declare what commodities shall be the subject of interstate commerce, and what shall not.

Buttfield vs. Stranahan, 192 U. S. 470, 24 S. Crt. 349, 48 L. Ed. 525.

Leisy vs. Hardin, 135 U. S. 100, 10 S. Crt. 681, 34 L. Ed. 128.

Bowman vs. Chicago, 125 U. S. 465, 8 S. Crt. 689, 1062, 31 L. Ed. 700.

Thurlow vs. Massachusetts, 5 How. 504, 12 L. Ed. 256.

Weber vs. Freed, 224 Fed. 355.

U. S. vs. Popper, 98 Fed. 423 (cited with approval in Hoke vs. U. S., 57 L. Ed. 523, 33 S. Crt. 281, 283).

U. S. vs. Gould, 25 F. Cas. No. 15, 239.

IV

Upon the face of the bill of complaint, it appears that the Hawes-Cooper Act is couched in the language used by the Congress in divesting intoxicating liquors of their interstate character in certain cases (Wilson Act), a proceeding upheld by this Court in In Re Rahrer, 140 U. S. 545, 11 S. Crt. 865, 35 L. Ed. 572.

12 C. J. 33.

V

That the Acts set forth in the bill of complaint violate no constitutional right of the State of Alabama. In this relation:

A. The State of Alabama as an entity is not within the due process or equal protection clauses of the constitution.

Scott vs. Frazier, 258 Fed. 669, 671.
Albright vs. Board of Commissioners, 194 Pac. 913.

B. Neither the Hawes-Cooper Act nor Chapter 216, Idaho Session Laws of 1933, violate the interstate commerce clause of the United States Constitution.

See authorities cited under III, A and B, supra.
In Re Rahrer, 140 U. S. 545, 35 L. Ed. 572.
Clark Distilling Co. vs. Western Maryland R.R. Co., 242 U. S. 311.
Silz vs. Hesterberg, 211 U. S. 31.
Hipolite Egg Co. vs. U. S., 220 U. S. 45.

VI

It appears from the face of the bill of complaint that the State of Alabama, in connection with the Gordon East Coast Company, is engaging in the production of prison-made commodities as an ordinary business. In such cases the State of Alabama is subjected to the same rules of law as any ordinary non-governmental agency. And accordingly:

A. It is subject to the equitable defense of laches.

South Carolina vs. United States, 199 U. S. 437, 50 L. Ed. 261.
Vilas vs. Manila, 220 U. S. 345, 55 L. Ed. 491, 495.
21 C. J. 217, Par. 216.
Cooke vs. United States, 23 L. Ed. 237, 243.
7 Ency. Sup. Crt. Rep. 820.
U. S. vs. Nashville Etc., 30 L. Ed. 81, 83.
National Exchange Bank vs. U. S., 151 Fed. 402, 411.
U. S. vs. Central National Bank, 6 Fed. 134.
Bolognesi vs. United States, 189 Fed. 335.

B. From the bill of complaint it appears that the State of Alabama transacts most of its commercial business in the State of Kentucky, where the Act complained of has been in effect since 1894 (Bill, p. 50), and in the State of Indiana, where the original Act (now made generally applicable) has been in effect since 1914 (Bill, p. 42). Likewise in Oklahoma the Act has been effective since 1910, in Montana since 1921, in Washington since 1927, in Colorado since 1921, and in New Jersey since 1925.

And it further appears from the bill of complaint (Bill, p. 17) that by far the major portion of the general commerce of Alabama in prison-made goods has been developed and is carried on in those states.

It is inconceivable that during these long periods of time in which Alabama has made no complaint, the prison production in these states has remained unaltered by the laws then adopted. There is not only long lapse of time, but in each of these states a definite system has developed as a result of its prison goods laws, in which the State of

Alabama has concurred by proceeding to develop its commerce therein. It appears a clear case for application of the doctrine of laches, this being a proceeding in equity. It is to be observed that by the terms of the bill of complaint, sale within the states having long standing laws is characterized as "ready" (Bill, p. 17), notwithstanding such laws.

VII

The Hawes-Cooper Act is in effect merely a declaration of the public policy of the United States relating to prison produced commodities. Such questions are beyond the jurisdiction of this Court and belong peculiarly to the legislative branch of government. In effect the Act is a mere declaration that Congress has elected to partially withdraw from its entire control of interstate commerce.

Heim vs. McCall, 239 U. S. 175, 36 S. Crt. 78, 60 L. Ed. 206.

Atkin vs. Kansas, 191 U. S. 207, 48 L. Ed. 148.

12 C. J. 887-890 and authorities under Note 39, 12 C. J. 890.

VIII

Though not a party in name, the United States is a party in fact and without its consent in this action, since it occupies the relation parens patriae to the citizens of the entire United States in an attack upon the constitutionality of an Act of Congress declarative of public policy.

Louisiana vs. McAdoo, 58 L. Ed. 1506.
Clark Distilling Co. vs. Western Maryland, Etc., 242 U. S. 311, 61 L. Ed. 326.

Being such, this Court is without jurisdiction in the premises.

Louisiana vs. Garfield, 53 L. Ed. 92.

IX

The Idaho Act (Bill, p. 38), being wholly based upon and purusant to the Hawes-Cooper Act, is valid if the latter is valid.

Clark Distilling Co. vs. Western Maryland Etc., 61 L. Ed. 326, 336.

The Hawes-Cooper Act cannot be tested in this action, for the reasons:

A. That the United States is a necessary party.

Kansas vs. United States, 204 U. S. 331, 341, 51 L. Ed. 510.
Oregon vs. Hitchcock, 202 U. S. 60, 50 L. Ed. 935.
Minnesota vs. Hitchcock, 185 U. S. 373, 46 L. Ed. 954.
11 Ency. U. S. Sup. Crt. Rep. 797-798.

B. That the United States is immune to suit herein.

Kansas vs. Colorado, 206 U. S. 46, 85, 51 L. Ed. 956.
The Siren, 7 Wall. 152, 19 L. Ed. 129.
See cases under Notes 98 and 1, in 11 Ency. Sup. Crt. Rep. 796.

X

That the Idaho Act (Bill, p. 38) operates with absolute uniformity upon all prison-produced commodities.

XI

By the tendered bill of complaint the State of Alabama seeks to invade the sovereign power of the State of Idaho reserved to it, in this:

A. That it is sought to have declared unconstitutional on behalf of a foreign sovereignty a law enacted in regulation of subject matter committed by Congress to the domestic control of the State of Idaho.

XII

It does not appear that the claimed injury to the State of Alabama is irreparable or even necessarily existent, for the reason: That shipment in interstate commerce is not forbidden by the Hawes-Cooper Act, and delivery and sales may be made in any of the remaining twenty-nine states of the United States.

Clark Distilling Co. vs. Western Maryland Etc.
61 L. Ed. 326, 337.

XIII

The effect of the tendered bill of complaint is to invade the sovereignty of the State of Idaho in its internal affairs and to restrain the enforcement of penal laws.

Ex Parte Young, 209 U. S. 123, 159.
Georgia vs. Stanton, 73 U. S. 60.

XIV

Action for injunction will not lie to restrain the enforcement of criminal or quasi-criminal statutes because of unconstitutionality.

Fitts vs. McGhee, 172 U. S. 516, 19 Sup. Crt. 269, 43 L. Ed. 535.

In Re Sawyer, 124 U. S. 200, 8. Sup. Crt. 482, 31 L. Ed. 402.

Nims vs. Gilmore, 17 Idaho 614, 107 Pac. 79.

XV

The bill of complaint tendered presents no justiciable issue.

Louisiana vs. Texas, 176 U. S. 1, 16.

XVI

From the tendered bill of complaint it appears that the fundamental motive for this action is avoidance of hardship to the citizens of Alabama generally and the inmates of her prisons specifically. Hardships occasioned by statute are no ground for assertion of invalidity.

U. S. vs. Missouri Pac. R. Co., 72 L. Ed. 322, 49 Sup. Crt. 133.

59 C. J. 969 and cases cited under Note 77.

XVII

The questions presented by the bill of complaint are in their nature political and are not subject to review or control by the judiciary.

Martin vs. Hunter, 1 Wheat. 304, 4 L. Ed. 97.
Union P. R.R. Co. vs. United States, 99 U. S. 700, 25 L. Ed. 496.
Penna. vs. Wheeling Bridge Co., 18 How. 421, 15 L. Ed. 435.
Louisville vs. Kentucky, 161 U. S. 677, 40 L. Ed. 849.

The State of Idaho, in presenting this showing of its objections, does not wish to be understood as waiving any of its objections which would go more especially to the merits of the controversy. And it is respectfully requested, in event this Honorable Court shall see fit to allow filing of the bill of complaint, that this defendant be granted leave to file its answer and present its defenses and brief in extenso.

The State of Idaho, therefore, prays that the plaintiff's motion for leave to file its bill of complaint be denied and that it recover its costs.

Respectfully submitted,

BERT H. MILLER,
Attorney General of Idaho.

APPENDIX A

UNITED STATES STATUTES AT LARGE

Vol. 45, p. 1084

CHAPTER 79

AN ACT To divest goods, wares, and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain cases:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, that all goods, wares, and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported into any State or Territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such State or Territory be subject to the operation and effect of the laws of such State or Territory, to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

SEC. 2. This Act shall take effect five years after the date of its approval.

Approved January 19, 1929.

APPENDIX B

IDAHO

CHAPTER 216, LAWS 1933, PAGE 255
(House Bill No. 299)
(Regular Session)

AN ACT Forbidding the sale of convict-made goods on the open market and applying state regulations as to the sale and distribution of convict-made goods to all such products regardless of origin, and defining open market: and providing a penalty.

Be It Enacted by the Legislature of the State of Idaho:

Section 1. The sale on the open market of this state of all goods, wares or merchandise manufactured or mined, wholly or in part by any penal and/or reformatory institution is hereby prohibited. On and after January 19, 1934, the provisions of this Act, and all other regulations and laws of this state in effect at that time and not inconsistent with this Act, shall apply to all goods, wares and merchandise manufactured or mined wholly or in part, by convicts or prisoners (except prisoners on parole or probation) or in any penal and/or reformatory institution and transported into the State of Idaho for use or distribution, to the same extent and in the same manner as if such goods and merchandise were so manufactured, produced or mined within the State of Idaho.

Section 2. It is hereby declared unlawful for the State of Idaho, or any of its officers or agencies, or any of the political subdivisions thereof, to enter into any contract

or other arrangement for the labor of any of the inmates of any of the penal and/or reformatory institutions of this state.

Section 3. For the purposes of this Act the provisions of Section 1 relating to sales on the open market shall not include the sale and/or exchange of convict-made goods produced in the penal and/or reformatory institutions to or with other penal, charitable, reformatory and/or custodial institutions the major portion of whose maintenance is contributed by this state and/or any of the political subdivisions thereof, for the use and/or consumption of said institutions or for the use and/or consumption of the population therein confined.

Section 4. The exchange of the prison products of institutions of this state as specified in this Act with the products of any other state is hereby prohibited.

Section 5. The Prison Board is hereby authorized and directed to make such rules and regulations governing the conduct of industries in the penal and/or reformatory institutions of this state as will (a) result in the manufacture, mining or production of only such goods, wares or merchandise as may be used or needed in the several penal, custodial, charitable and/or reformatory institutions the major portion of whose maintenance is contributed by this state or any of the political subdivisions thereof, or for the use and consumption of the institutionally confined population of said institutions; and (b) result in the manufacture at such penal and/or reformatory institutions of as wide a variety of products as practicable, it being the purpose and intent of this provision to direct

the management of said institutions so as diversify the products of said institutions as to eliminate the concentration of prison labor in any one or few industries, thus to minimize as nearly as may be possible the competition of said industries with private industry and private capital; Provided, however, that no goods, wares or merchandise manufactured or mined in any penal and/or reformatory institution of this state shall be shipped outside of this state for sale and/or exchange.

Section 6. The Prison Board shall make such rules and regulations as may be necessary to set up in the said penal and/or reformatory institutions of this state a cost accounting system in connection with the manufacture or production of all goods, wares or merchandise of said institutions, which cost accounting system shall take into consideration a reasonable compensation to be set aside for the labor of any prisoner or convict employed in any industry of said institutions, which compensation shall be held for the benefit of said prisoner or convict, or under proper rules and regulations remitted to the dependents of said prisoners or convicts.

Section 7. The sale price of products made in any penal, and/or reformatory institution for the sale to or the use of any of the institutions hereinabove mentioned, shall be as nearly as practicable the same as the sale price of similar merchandise manufactured in private industry.

Section 8. The Governor and such officials as may direct or control the management of penal, custodial, charitable and/or reformatory institutions of the state or political subdivisions thereof, shall jointly, annually effect such

rules and regulations as may be necessary to carry out the purpose and intent of this Act: to-wit, the purchase by said institutions of the products to be manufactured in the penal and/or reformatory institutions of this state.

Section 9. The words "open market" as used in this Act, shall mean all sales and/or exchanges conducted or transacted through the medium of stores, shops, sales offices, sales agents or agencies, whether retail or wholesale, or in any other manner, to the consuming public.

Section 10. Whoever sells or exposes for sale any goods, wares or merchandise, manufactured, produced, or mined wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation or in any penal and/or reformatory institutions except in the method established by law shall upon conviction be subject to a fine of three hundred dollars ($300) or imprisonment for ninety days or both such fine and imprisonment, and each such sale or offer for sale shall be considered a separate offense.

Approved, March 18, 1933.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1939

No. ——, Original.

THE STATE OF ALABAMA, Complainant,

v.

THE STATES OF ARIZONA, CALIFORNIA, COLORADO, ET AL., Defendants.

RETURN OF THE STATE OF INDIANA TO RULE TO SHOW CAUSE WHY LEAVE TO FILE BILL OF COMPLAINT IN THE ABOVE ENTITLED CAUSE SHOULD NOT BE GRANTED.

JOSEPH W. HUTCHINSON,
Assistant Attorney General of Indiana,
Attorney for said Defendant,
The State of Indiana.

PHILIP LUTZ, JR.,
Attorney General of Indiana,
Of Counsel.

Wm. B. Burford Printing Co., Indianapolis

INDEX.

	Page
Acknowledgment by Plaintiff of Receipt of Copy of Return	3
Authorities	4
Return	5
Appendix A	10
Appendix B	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. —— Original

THE STATE OF ALABAMA - - - Complainant,

v.

THE STATES OF ARIZONA, CALIFORNIA, COLORADO, ET AL. - - - - - Defendants.

RECEIPT OF COPY OF RETURN OF STATE OF INDIANA BY PLAINTIFF.

To Thomas E. Knight, Jr., Attorney General of State of Alabama:

The undersigned, Attorney General of the State of Alabama, hereby acknowledges service of a copy of the attached return of the State of Indiana in the above cause this.....day of....., 1933.

.....

Attorney General of Alabama.

AUTHORITIES.

	Page
Adams Express Co. v. Kentucky, 238 U. S. 190, at p. 197	7
Albright v. Bd. of Comm'rs, 194 Pac. 913 (1921), Kansas	8
Clark Distilling Co. v. Western Md. R. R. Co., 242 U. S. 311 (1917)	7
Georgia v. Stanton, 73 U. S. 60	8
Hamilton v. Kentucky Distilleries & W. Co., 251 U. S. 146, at p. 156	7
Hipolite Egg Co. v. U. S., 220 U. S. 45	7
Lottery Case, 188 U. S. 321, at p. 357 et seq.	7
Louisiana v. Texas, 176 U. S. 1, at p. 16	9
Rahrer, In re, 140 U. S. 545, at p. 561	7
Rhodes v. Iowa, 170 U. S. 412, 420 (1898)	7
Silz v. Hesterberg, 211 U. S. 31 (1908)	7
Scott v. Frazier, 258 Fed. 669, 671. (Decided, 1920, on another point in 253 U. S. 243.)	8
Young, Ex Parte, 209 U. S. 123, 159	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. —— Original

THE STATE OF ALABAMA - - - Complainant,

v.

THE STATES OF ARIZONA, CALIFORNIA, COLORADO, ET AL. - - - - - Defendants.

RETURN OF THE STATE OF INDIANA TO RULE TO SHOW CAUSE WHY LEAVE TO FILE BILL OF COMPLAINT IN THE ABOVE ENTITLED CAUSE SHOULD NOT BE GRANTED.

The State of Indiana for its return to the rule heretofore entered on May 15, 1933, to show cause why leave to file the bill of complaint in the above entitled cause should not be granted says:

The State of Indiana does not object to a determination upon its merits of the controversy sought to be set out and embodied in the bill of complaint nor does the State of Indiana desire to interpose needless obstacles to such result but said State of Indiana says that there are considerations and grounds appearing from said petition for leave and from said bill of complaint on account of which leave to file said bill of complaint should not be granted as follows, to wit:

I. The purpose of said suit, as stated in the complaint, is to have declared unconstitutional certain laws of the defendant States set out in the appendix to the bill of complaint upon the ground that said laws violate the Commerce Clause of the United States Constitution; and to have declared unconstitutional the Hawes-Cooper Act of the Congress of the United States upon the ground that said act violates the Commerce Clause and the Tenth Amendment to the United States Constitution.

THE BILL OF COMPLAINT SHOWS UPON ITS FACE A MISJOINDER OF CAUSES OF ACTION AND OF DEFENDANTS.

(a) There are separate classes of statutes in force in the nineteen defendant States, differing in the manner of control or restriction as to sale of prison-made products.

Bill of Complaint, Appendix A, pp. 29-76;
Bill of Complaint, Paragraph 12, p. 16.

(b) No joint action or enforcement is set forth which warrants the joining of the defendants.

II. NO CONSTITUTIONAL RIGHT GUARANTEED TO THE STATE OF ALABAMA BY THE CONSTITUTION OF THE UNITED STATES IS VIOLATED OR THREATENED WITH VIOLATION BY THE ACTS ALLEGED IN THE BILL OF COMPLAINT SOUGHT TO BE FILED.

1. (a) The Hawes-Cooper Act is a legitimate exercise of the authority conferred upon the Congress by paragraph 3, section 8 of Article I of the United States Constitution which, among other things, provides that "The Congress shall have power * * * to regulate com-

merce with foreign nations and among the several states, and with the Indian tribes."

In re Rahrer, 140 U. S. 545 at p. 561;
Lottery Case, 188 U. S. 321 at p. 357 et seq.;
Adams Express Co. v. Kentucky, 238 U. S. 190 at p. 197;
Rhodes v. Iowa, 170 U. S. 412, 420 (1898);
Clark Distilling Co. v. Western Md. R. R. Co., 242 U. S. 311 (1917);
Silz v. Hesterberg, 211 U. S. 31 (1908);
Hipolite Egg Co. v. U. S., 220 U. S. 45.

(b) The principle underlying and sustaining the Hawes-Cooper Act as a valid exercise of the authority conferred upon the Congress by the Commerce Clause of the Constitution is identical with the principle and authority upon which the Wilson Act of 1890 was sustained in In re Rahrer, *supra*.

(c) The uniformity of operation of the Hawes-Cooper Act is not affected by variations in the state laws governing the dealing in prison-made goods.

In re Rahrer, 140 U. S. 545 at p. 561;
Adams Express Co. v. Kentucky, 238 U. S. 190 at p. 197.

2. (a) The Hawes-Cooper Act does not violate the Tenth Amendment to the United States Constitution. If, as already shown, the act is a valid exercise of the power of the Congress in regulating interstate commerce, its incidental operation as a police measure does not violate the Tenth Amendment reserving to the States or to the people the powers not delegated to the United States.

Lottery Case, 188 U. S. 321 at p. 357;
Hamilton v. Kentucky Distilleries & W. Co., 251 U. S. 146 at p. 156.

3. (a) The Fourteenth Amendment to the Constitution of the United States does not encompass the State of Alabama as such within its protection, and the due process or equal protection clauses thereof may not be availed of by the State of Alabama.

Scott v. Frazier, 258 Fed. 669, 671. (Decided, 1920, on another point in 253 U. S. 243);
Albright v. Bd. of Comm'rs, 194 Pac. 913 (1921), Kansas.

4. (a) Chapter 269 of the Acts of the General Assembly of Indiana of 1933 does not violate the constitutional provisions referred to in the complaint. It is not a regulation of commerce between the States and does not purport to be such.

Bill of Complaint—Appendix A, p. 47;
Bill of Complaint—Appendix B, p. 77;
In re Rahrer, 140 U. S. 545 at p. 561.

(b) The provisions of Chapter 269 of the Acts of 1933 of Indiana, with the exception of governmental use, place no greater degree of restriction upon the sale in Indiana of Alabama prison-made goods than upon those of Indiana or other States.

III. THE EFFECT OF THE BILL OF COMPLAINT IS TO INVADE THE SOVEREIGNTY OF THE STATE OF INDIANA IN THE CONSTITUTIONAL EXERCISE OF ITS INTERNAL AFFAIRS AND TO RESTRAIN IN STATE COURTS THE ENFORCEMENT OF STATE LAWS, CRIMINAL IN EFFECT.

Ex parte Young, 209 U. S. 123, 159;
Georgia v. Stanton, 73 U. S. 60.

IV. NO JUSTICIABLE CONTROVERSY BETWEEN STATES IS PRESENTED BY THE COMPLAINT.

Louisiana v. Texas, 176 U. S. 1 at p. 16.

Wherefore, said defendant prays that an order be entered in said cause denying the plaintiff leave to file said bill of complaint; but if this Honorable Court shall determine to permit said bill to be filed, the State of Indiana begs leave to file such other pleadings in said cause as are proper in the premises to the end that the constitutional questions sought to be presented may be decided by this Honorable Court.

JOSEPH W. HUTCHINSON,
Assistant Attorney General of Indiana,
Attorney for said Defendant,
The State of Indiana.

PHILIP LUTZ, JR.,
Attorney General of Indiana,
Of Counsel.

APPENDIX A.

THE INDIANA ACT.

Section 1. *Be it enacted by the General Assembly of the State of Indiana,* That all goods, wares and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institution, transported into the State of Indiana, and remaining therein for use, consumption, sale, or storage, shall, upon arrival and delivery in the State of Indiana, be subject to the operation and effect of the laws of the State of Indiana, to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in the State of Indiana by inmates of the Indiana Reformatory, of the Indiana state prison, or of the Indiana state farm; and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

Sec. 2. This act shall take effect on the 19th day of January, 1934.

APPENDIX B.

THE HAWES-COOPER ACT.

Chap. 79.—An Act.

To divest goods, wares, and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That all goods, wares, and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institu-

tions, except commodities manufactured in federal penal and correctional institutions for use by the Federal Government, transported into any State or Territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such State or Territory be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

Sec. 2. This act shall take effect five years after the date of its approval.

Approved January 19, 1929.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. Original

STATE OF ALABAMA,	*Plaintiff,*	*In Equity.*
VS.		
STATE OF ARIZONA, et al,	*Defendants.*	

RETURN SUBMITTED ON BEHALF OF THE STATE OF IOWA ON APPLICATION OF STATE OF ALABAMA FOR PERMISSION TO FILE BILL OF COMPLAINT.

SUBJECT INDEX

Page

PRELIMINARY STATEMENT 5
Division I. 5
Division II. 7
Division III. 7
Division IV. 8
Division V. 9
Division VI. 9

CONCLUSION 10

TABLE OF CASES CITED:

Adams Express Co. vs. Kentucky 214 U. S. 218.

Albright vs. Board of Commissioners 194 Pac. 913 (1921) (Kansas).

Clark Distilling Co. vs. Western Maryland R. R. Co. 242 U. S. 311 (around 1917).

Ex parte Young 209 U. S. 123, 159.

Georgia vs. Stanton 73 U. S. 60.

Hill vs. Hesterberg 184 N. Y. 126.

Hipolite Egg Co. vs. U. S. 220 U. S. 45.

Louisiana vs. Texas 176 U. S. 1, (20 Sup. Ct. 251; 44 L. Ed. 347).

Oklahoma vs. Gulf Colo. and Santa Fe Railroad 220 U. S. 290.

In re Rahrer 140 U. S. 545 (1891).

Silz vs. Hesterberg 211 U. S. 31 (around 1908).

Scott vs. Frazier 258 Fed. 669,, 671 (decided 1920 on another point in 253 U. S. 243).

South Carolina vs. U. S. 199 U. S. 437, 461.

Wisconsin vs. Pelican Ins. Co. 127 U. S. 265, 288; 32 L. Ed. 239).

TABLE OF STATUTES CITED:

Acts of Congress Jan. 19, 1919 45 Stat. 1084.

Article I, Sec. 8, Clause 3, Constitution of United States.

Chapter 50, 45th General Assembly, Iowa, 1933.

Fourteenth Amendment, Constitution of United States.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

In Equity

No. Original

STATE OF ALABAMA,

Plaintiff,

VS.

THE STATES OF ARIZONA, California, Colorado, Idaho, Indiana, Iowa, Kentucky, Michigan, Minnesota, Montana, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Washington, and Wisconsin,

Defendants.

RETURN SUBMITTED ON BEHALF OF THE STATE OF IOWA ON APPLICATION OF STATE OF ALABAMA FOR PERMISSION TO FILE BILL OF COMPLAINT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Preliminary Statement.

And now comes the State of Iowa, and, in return to the Show Cause order under date of the 15th day of May A. D. 1933 why leave to file the Bill of Complaint against the said State of Iowa should not be granted, states:

The State of Iowa does not object to a determination upon the merits of the controversy sought to be adjudicated by the petition and bill of complaint herein, nor does the State of Iowa desire to interpose needless obstructions to such result. There are, however, considerations of consequence which weigh heavily against the granting of leave to file the petition herein and against a determination of the issues on the basis of the complaint herein. In brief, these considerations are:

I.

No constitutional right guaranteed to Alabama by the Constitution of the United States is violated or threatened with violation by the acts alleged in the Bill of Complaint sought to be filed.

(a) The Fourteenth Amendment to the Constitution of the United States does not encompass the State of Alabama as such within its protection, and the due process or legal protection clauses thereof may not be availed of by the State of Alabama.

Scott vs. Frazier 258 Federal 669, 671 (decided 1920 on another point in 253 U. S. 243).

Albright vs. Board of Commissioners 194 Pac. 913 (1921) (Kansas).

(b) The Act of Congress of January 19, 1919, 45 Stat. 1084, (complaint page 77), known as the Hawes-Cooper Act does not violate the Interstate Commerce clause of the Constitution of the United States, (Article I, Sec. 8, Clause 8), nor does it constitute an imposition of an invalid burden upon Congress among the States. It is a proper exercise of the regulatory power of Congress over Interstate Commerce.

In re Rahrer 140 U. S. 545 (1891).

Rhodes vs. Iowa 170 U. S. 412, 420 (around 1898).

Clark Distilling Co. vs. Western Maryland R. R. Co., 242 U. S. 311 (around 1917).

Silz vs. Hesterberg 211 U. S. 31 (around 1908).

Hipolite Egg Co. vs. U. S. 220 U. S. 45.

(c) The provisions of Chapter 50 of the laws of the 45th General Assembly of the State of Iowa, 1933, known as Senate File Number 129, passed during the regular session of said Assembly and which are set forth at pages 48, 49, and 50 of the Bill of Complaint place no greater degree of restriction upon the sale in Iowa of Alabama Prison-made Goods than upon those of Iowa or any other state. This Iowa law is in no way discriminatory as against prison-made goods of Alabama or any other state.

(d) Chapter 50 of the laws of the 45th General Assembly, 1933, of the State of Iowa known as Senate File Number 129, passed during the regular session of the said Assembly, when read in conjunction with the Act of Congress of Jan-

uary 19, 1929, 45 Stat. 1084, does not violate the provisions of Article I, Section 8, of the Constitution of the United States.

In re Rahrer 140 U. S. 545.

Rhodes vs. Iowa 170 U. S. 412.

Silz vs. Hesterberg 211 U. S. 31.

Adams Express Co. vs. Kentucky 214 U. S. 218.

Hill vs. Hesterberg 184 N. Y. 126.

II.

The effect of the Bill of Complaint is to invade the sovereignty of the State of Iowa in its internal affairs and to restrain the enforcement of State laws in state courts, criminal in effect. The State of Alabama has no right to demand such relief.

Ex parte Young 209 U. S. 123, 159.

Georgia vs. Stanton 73 U. S. 60.

III.

No actual controversy between states is herein presented in the Bill of Complaint.

(a) No act or omission to act regarding any matter or thing involving property of Alabama or denial of any valid request by Alabama giving rise to a justiciable controversy is set forth.

Louisiana vs. Texas 176 U. S. 1, 16.

(b) The Bill of Complaint sets forth no conflict of right affecting property owned by the state of Alabama in its sovereign capacity or of property of the citizens of Alabama which the state itself may protect in the character parings patriae; the complaint clearly showing upon its face that the State of Alabama is engaging in the commercial production and sale of articles of commerce and, as such, is acting in a proprietary capacity, or is engaging in a private business of an extra governmental nature.

South Carolina vs. U. S. 199 U. S. 437, 461.

(c) The engaging in the production and sale of prison-made goods by the State of Alabama is not a necessary governmental function of the sovereign State of Alabama.

(d) The complaint fails to show that the production and sale of prison-made good is a necessary incident to the present system of the State of Alabama.

South Carolina vs. U. S. 199 U. S. 437, 461.

IV.

The Bill of Complaint seeks to compel the performance of obligations on the part of the State of Iowa which, if the states had been independent nations, could not have been enforced judically but only through the political departments of our governments.

Wisconsin vs. Pelican Ins. Co. 127 U. S. 265, 288 (32 L. Ed. 239).

Louisiana vs. Texas 176 U. S. 1, (20 Supreme Ct. 251) (44 L. Ed. 347).

V.

The Bill of Complaint seeks to require the State of Iowa and the other defendant states to cooperate and assist the State of Alabama in the administration of its penal laws and the enforcement of its sentences of hard labor. The Supreme Court should not entertain jurisdiction to require Iowa and the other defendant states to thus assist the State of Alabama in the administration of its penal laws and the enforcement of sentences of hard labor.

Wisconsin vs. Pelican Ins. Co. 127 U. S. 265.

Oklahoma vs. Gulf Colo. & Santa Fe Railroad 220 U. S. 290.

VI.

The Bill of Complaint presents upon its face a misjoinder of causes of action and of defendants.

(a) There are separate classes of statutes in force in the eighteen (18) states, differing in the manner of control or restriction of prison-made products. Violations among those classes of statutes are observed: Appendix A, pages 29-76, Bill—Paragraph 12, page 12.

(b) No joint action or enforcement is set forth which might possibly warrant the joinder of the defendants.

CONCLUSION

The State of Iowa feels that the above and foregoing considerations are of sufficient importance to warrant the court to deny to the State of Alabama the right to file this Bill of Complaint. However, in the event that this Honorable Court should determine to permit the Bill to be filed, the State of Iowa begs leave to file an answer thereto and to present its evidence in proper manner to the end that the issues may be fairly adjudicated and speedily determined.

If this Honorable Court shall decide that the petition and Complaint presents no cause of action on the merits, the State of Iowa prays a denial of the petition with costs.

Respectfully submitted,

THE STATE OF IOWA,

By EDWARD L. O'CONNOR,
Attorney General of the State of Iowa,

WALTER F. MALEY,
First Asst. Attorney General of the State of Iowa.

J. M. PARSONS,
of Counsel.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. ____ Original

STATE OF ALABAMA, Plaintiff,

vs.

THE STATES OF ARIZONA, CALIFORNIA, COLORADO, IDAHO, IOWA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, WASHINGTON, and WISCONSIN, Defendants.

IN EQUITY

Return of the State of Kentucky to Show Cause Order Dated May 19th, 1952, Submitted on Behalf of The State of Kentucky

EARLE C. WILLIAMS,
Attorney General of Kentucky,

W. H. ELLIOTT,
Assistant Attorney General,
Frankfort, Kentucky.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No._____ ORIGINAL

STATE OF ALABAMA, Plaintiff,

vs.

THE STATES OF ARIZONA, CALIFORNIA, COLORADO, IDAHO, INDIANA, IOWA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, WASHINGTON, and WISCONSIN, Defendants.

IN EQUITY

RETURN OF THE STATE OF KENTUCKY TO SHOW CAUSE ORDER DATED MAY 15TH, 1933, SUBMITTED ON BEHALF OF THE STATE OF KENTUCKY.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes the State of Kentucky and, in return to the order to show cause under date of May 15, 1933, why leave to file a bill of complaint against the said State of Kentucky should not be granted, says:

The State of Kentucky does not desire to object to a determination of the controversy sought to be adjudi-

cated by the petition hereon upon its merits, nor does the State of Kentucky desire to interpose needless obstacles thereto.

The State of Kentucky desires that the issue involved in the said cause be determined as speedily as possible. In event this honorable court shall determine to permit the bill to be filed, the State of Kentucky asks leave to file answer thereto and to present its evidence in proper manner to the end that the said issue may be fairly determined.

Respectfully submitted,

BAILEY P. WOOTTON,
Attorney General of Kentucky.

S. H. BROWN,
Assistant Attorney General

THE STATE JOURNAL COMPANY
Printers to The Commonwealth
Frankfort, Kentucky

FILE COPY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. Original

STATE OF ALABAMA, COMPLAINANT,

vs.

STATE OF ARIZONA ET AL.

RETURN OF THE STATE OF MINNESOTA TO RULE TO SHOW CAUSE.

HARRY H. PETERSON,
Attorney General of the
State of Minnesota.

INDEX.

Subject Index

Return to rule to show cause:	Page
I. No constitutional right of plaintiff is violated	1
A State is not a "person"	1
Hawes-Cooper Act does not violate the commerce clause of the Constitution	1
The Minnesota law is valid if the Hawes-Cooper Act is valid	1
II. Granting of relief herein would invade sovereignty of Minnesota	2
III. No justiciable controversy is presented	3
IV. There is a misjoinder of causes of action and defendants	3
V. A cause of action is not stated against the defendants or any of them	3
Conclusion	3

Authorities Cited.

Tables of Cases:	
Albright v. Bd. of Commissioners, 194 Pac. 913 (1921) Kansas.	2
Clark Distilling Co. v. Western Md. R. R. Co., 242 U. S. 311 (1917)	2
Florida v. Mellon, 272 U. S. 12	3
Georgia v. Stanton, 73 U. S. 50	2
Louisiana v. Texas, 176 U. S. 1	3
Rahrer, In re, 140 U. S. 545 (1891)	2
Rhodes v. Iowa, 170 U. S. 412 (1898)	2
Scott v. Frazier, 258 Fed. 669, reversed on other grounds, 40 S. Ct. 503, 253 U. S. 243,, 64 L. Ed. 883	2
Seaboard Air Line Ry. v. North Carolina, 243 U. S. 298	2
Wisconsin v. Pelican Ins. Co., 127 U. S. 265	3
Young, Ex Parte, 209 U. S. 123	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. Original

STATE OF ALABAMA, PLAINTIFF,

vs.

STATE OF ARIZONA ET AL., DEFENDANTS.

RETURN SUBMITTED ON BEHALF OF THE STATE OF MINNESOTA ON APPLICATION OF STATE OF ALABAMA FOR PERMISSION TO FILE BILL OF COMPLAINT.

Now comes the State of Minnesota and for its return to the rule to show cause, issued on the fifteenth day of May, 1933, why leave to file the bill of complaint should not be granted, respectfully states and shows to the court that:

I.

The bill of complaint sought to be filed fails to allege acts committed, or threatened to be committed, by the defendants which violate any constitutional right of the State of Alabama.

(*a*) A State is not a "person" within the meaning of the "due process" and "equal protection" clauses of the Fourteenth Amendment.

Scott v. *Frazier*, 258 Fed. 669, reversed on other grounds, 40 S. Ct. 503, 253 U. S. 243, 64 L. Ed. 883;
Albright v. *Bd. of Commissioners*, 194 Pac. 913 (1921) Kansas.

(*b*) The Hawes-Cooper Act (45 Stat. 1084) does not violate the commerce clause of the Constitution (Article 1, Sec. 8, Clause 3), nor does it impose an invalid burden upon commerce among the States. It is proper exercise of the regulatory power of Congress over interstate commerce.

In re Rahrer, 140 U. S. 545 (1891);
Rhodes v. *Iowa*, 170 U. S. 412 (1898);
Clark Distilling Co. v. *Western Md. R. R. Co.*, 242 U. S. 311 (1917);
Seaboard Airline Ry. v. *North Carolina*, 245 U. S. 298.

(*c*) The Minnesota law, Chapter 138, Laws of Minnesota 1929 (printed at pages 57 and 58 of the bill of complaint), operates with absolute uniformity upon all prison produced commodities and is valid if the Hawes-Cooper Act is valid.

Clark Distilling Co. v. *Western Md. R. R. Co.*, 242 U. S. 311.

II.

The granting of the relief sought by the bill of complaint would invade the sovereignty of the State of Minnesota in its internal affairs and restrain the State in the enforcement of its laws, criminal in effect.

Ex parte Young, 209 U. S. 123;
Georgia v. *Stanton*, 73 U. S. 50.

III.

No justiciable controversy between States is herein presented.

Louisiana v. *Texas*, 176 U. S. 1.

It does not appear that Alabama has suffered a wrong furnishing ground for judicial redress or is asserting a right susceptible of judicial enforcement. The mere fact that a State is the plaintiff is not enough.

Florida v. *Mellon*, 273 U. S. 12;

Wisconsin v. *Pelican Ins. Co.*, 127 U. S. 265.

IV.

The bill of complaint presents upon its face a misjoinder of causes of action and of defendants.

(*a*) The various statutes in force in the nineteen defendant States differ in form and in manner of control or restriction of prison-made products.

(*b*) No joint action is set forth which would warrant a joinder of the defendants.

V.

The bill of complaint fails to state a cause of action against the said defendants or any of them.

Wherefore, the State of Minnesota prays

(1) that the motion for leave to file the bill of complaint be denied;

(2) that in the event this Honorable Court shall grant the motion, the State of Minnesota be permitted to file an answer thereto and to present its evidence in the proper manner or make such other and further motion as may be deemed proper in the premises.

HARRY H. PETERSON,
Attorney General of the
State of Minnesota.

(4386)

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No....., Original

In Equity

STATE OF ALABAMA,

Plaintiff,

v.

STATE OF ARIZONA, *et al*,

Defendant.

RETURN OF THE STATE OF MONTANA TO THE RULE TO SHOW CAUSE WHY LEAVE SHOULD NOT BE GRANTED TO FILE THE BILL OF COMPLAINT.

RAYMOND T. NAGLE,
Attorney General,
Counsel for the State of Montana.

STATE CAPITOL,
HELENA, MONTANA

INDEX

Page

RETURN OF STATE OF MONTANA ON RULE TO SHOW CAUSE 1

I. No Constitutional Right Guaranteed to Alabama Violated 2

(a) 14th Amendment does not apply 2

(b) Hawes-Cooper Act does not violate commerce clause 2

(c) Montana law does not discriminate against Alabama 3

(d) Montana law does not violate Art. I, Sec. 8, U. S. Constitution 6

II. Sustaining Bill Would Invade Sovereignty of State of Montana 7

III. No Actual Controversy Between States 7

(a) No right of Alabama invaded 7

IV. Misjoinder of Causes and Parties 7

(a) Statutes differ 7

(b) No joint action on part of defendants 7

V. Similar Action Pending in New York 8

(a) Will be carried to this court 8

(b) Defendants herein will ask to join 8

VI. Conclusion 8

Table of Cases

Page

ADAMS EXPRESS v. KENTUCKY, 214 U. S. 218 7

ALBRIGHT v. BD. OF COMM'RS, (KAN.), 194 PAC. 913 2

CLARK DISTILLING CO. v. WESTERN MD. R. R. CO., 242 U. S. 311 2

GEORGIA v. STANTON, 73 U. S. 60, 6 WALL. 50 7

HILL v. HESTERBERG, 184 N. Y. 126 7

HIPPOLITE EGG CO. v. U. S., 220 U. S. 45 2

LOUISIANA v. TEXAS, 176 U. S. 1 7

IN RE RAHRER, 140 U. S. 545 2-7

RHODES v. IOWA, 170 U. S. 412 2-7

SCOTT v. FRAZIER, 258 F. 669 2-7

SILZ v. HESTERBERG, 211 U. S. 31 2

EX PARTE YOUNG, 209 U. S. 123 7

Statutes

ACT OF CONGRESS JAN. 19, 1929, 45 STAT. 1084 2-8

CH. 172, LAWS OF MONTANA, 1933 3-6

SECS. 11572, 11573, REVISED CODES MONTANA 1921 3-6

CH. 26, L. 1933 OF NEW YORK 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No....., Original

In Equity

STATE OF ALABAMA,

Plaintiff,

v.

STATE OF ARIZONA, *et al,*

Defendant.

RETURN SUBMITTED ON BEHALF OF STATE OF MONTANA ON APPLICATION OF STATE OF ALABAMA FOR PERMISSION TO FILE BILL OF COMPLAINT.

Now comes the State of Montana, and in return to the rule to issue cause under date of May 15, 1933, why leave to file the bill of complaint against the State of Montana, among others, should not be granted, says:

The State of Montana does not object to a determination upon the merits of the controversy sought to be adjudicated by the petition herein, nor does the State of Montana desire to interpose needless obstacles to such result. However, since the court will consider its jurisdiction to entertain the matter, as well as whether or not

a justiciable question is presented, there are certain considerations of consequence which should be called to the attention of the court. Briefly stated these considerations are:

I. No constitutional right guaranteed to Alabama by the Constitution of the United States is violated or threatened with violation by the acts alleged in the bill of complaint sought to be filed.

(a) The Fourteenth Amendment to the Constitution of the United States does not encompass the State of Alabama as such within its protection, and the due process or equal protection clauses thereof may not be availed of by the State of Alabama.

Scott v. Frazier, 258 Fed. 669, 671. (Decided, 1920, on another point in 253 U. S. 243.)

Albright v. Bd. of Com'rs, 194 Pac. 913 (1921) —Kansas.

(b) The Act of Congress of Jan. 19, 1929, 45 Stat. 1084 (Complaint, p. 77), known as the Hawes-Cooper Act, does not violate the interstate commerce clause of the Constitution of the United States (Art. I, Sec. 8, Cl. 3), nor does it constitute an imposition of an invalid burden upon commerce among the States. It is a proper exercise of the regulatory power of Congress over interstate commerce.

In Re Rahrer, 140 U. S. 545 (1891)
Rhodes v. Iowa, 170 U. S. 412, 420 (1898)
Clark Distilling Co. v. Western Md. R. R. Co., 242 U. S. 311 (1917)
Silz v. Hesterberg, 211 U. S. 31 (1908)
Hipolite Egg Co. v. U. S., 220 U. S. 45.

(c) The provisions of Chapter 172, Laws of the Twenty-third Legislative Assembly of the State of Montana, 1933, place no greater degree of restriction upon the sale in Montana of prison goods made in Alabama than upon those of the State of Montana or any other state.

Note: The statutes of the State of Montana set forth at page 59 of the proposed complaint, to-wit: Sections 11572 and 11573, R. C. M. 1921, were repealed by implication by said chapter 172, Laws of 1933, which reads:

> "An Act Prohibiting the Sale or Exchange in the Open Market of Goods, Wares and Merchandise Produced, Manufactured or Mined by Convicts or Prisoners Under Sentence in the State, or in or by Any Penal or Reformatory Institution of the State, or Produced, Manufactured or Mined by Convicts or Prisoners Outside the State, or in or by Any Penal or Reformatory Institution of the United States or Any State or Foreign Country, and Transported to This State for Use or Consumption Therein; Providing for the Sale or Exchange of Goods, Wares and Merchandise Made in or by Any Penal or Reformatory Institution of the State to or with Any Other Penal or Reformatory Institution or Any Charitable or Custodial Institution, the Major Portion of Whose Maintenance is Contributed by the State or Some Political Subdivision Thereof; Authorizing the Board of State Prison Commissioners to Make Rules to Govern the Conduct of Industries in the Penal and Reformatory Institutions of the State, to Facilitate the Sale and Exchange of Such Goods, Wares and Merchandise; and fixing Penalties for a Violation of the Provisions Thereof.

Be it enacted by the Legislative Assembly of the State of Montana:

Section 1. That on and after January 14, 1934, except as otherwise hereinafter provided, the sale in the open market in this state, of all goods, wares and merchandise manufactured, produced or mined, wholly or in part, by convicts or prisoners, under sentence in the state, (except prisoners on parole or probation) or in or by any penal or reformatory institution of the state is hereby prohibited. The provisions of this Act, and all other regulations and laws of this state in effect at the time and not inconsistent with this Act, shall apply to all goods, wares and merchandise manufactured, produced or mined, wholly or in part, by convicts or prisoners outside the state (except prisoners on parole or probation) or in or by any penal or reformatory institution of the United States, or any state or foreign country, and transported into this state for use or consumption therein, to the same extent and in the same manner as if such goods and merchandise were so manufactured, produced or mined within the State of Montana.

Section 2. For the purposes of this Act the provisions of Section 1, relating to sales in the open market, shall not include the sale or exchange of goods produced in any penal or reformatory institution of the state to or with any other penal or reformatory institution or any charitable or custodial institution, the major portion of whose maintenance is contributed by the state, or any of the political subdivisions thereof for the use or consumption of the persons therein confined.

Section 3. The exchange of the products of penal or reformatory institutions of this state, as specified in this Act, for the products of any other state, is hereby prohibited.

Section 4. The Board of State Prison Commissioners is hereby authorized and directed to make such rules and regulations governing the conduct of industries in the penal and reformatory institutions of the state as will (a) result in the manufacture, mining or production of only such goods, wares and merchandise as may be used or needed in the several penal, custodial, charitable and reformatory institutions, the major portion of whose maintenance is contributed by this state, or any of the political subdivisions thereof, or used and consumed by the persons confined in such institutions; and (b) result in the manufacture at such penal or reformatory institutions of as wide a variety of products as practicable, it being the purpose and intent of this provision to have the products of said institutions so diversified as to prevent the concentration of prison or reformatory labor in any one or few industries, thus to minimize as nearly as may be the possible competition of said industries with private industry and private capital; provided, however, that no goods wares or merchandise manufactured, produced or mined in or by any penal or reformatory institution of this state shall be shipped outside of this state for sale or exchange, except articles and things made by an inmate of any such institution for his own individual profit.

Section 5. Nothing herein contained shall be deemed to prevent any of the said institutions from manufacturing motor vehicle number plates, and other articles required or needed by the office of the Registrar of Motor Vehicles, or from preventing any of said institutions selling or disposing of any reasonable surplus of produce raised exclusively for the use, feeding or maintenance of the inmates of any of said institutions.

Section 6. The sale price of products made in any penal or reformatory institution for the sale to or

the use of any of the institutions hereinbefore mentioned, shall as nearly as practicable the same as the sale price of similar merchandise manufactured in the private industry.

Section 7. The Board of State Prison Commissioners shall anually meet and effect such rules and regulations as may be necessary to facilitate the sale and exchange between the institutions hereinbefore mentioned of the goods, wares and merchandise manufactured, produced or mined by them or any of them.

Section 8. The words "Sales in the Open Market," as used in this Act, shall mean all sales made to the consuming public, through the medium of stores, shops, sales offices, sales agents or agencies, whether retail or wholesale, or in any other manner.

Section 9. Any person or corporation who shall knowingly violate the provisions of this Act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than Twenty-five Dollars ($25.00) or more than One Thousand Dollars ($1,000.00), or by imprisonment in the county jail for a period of not less than ten (10) days or more than six (6) months, or by both such fine and imprisonment.

Section 10. All Acts and parts of Acts in conflict herewith are hereby repealed.

Approved March 16, 1933."

The State of Montana hereby stipulates that the foregoing statute may be read into the complaint in lieu of sections 11572 and 11573 R. C. M. 1921, set forth at page 59.

(d) Chapter 172, Laws of the Twenty-third Legislative Assembly of the State of Montana, 1933, does

not violate the provisions of Art. I, Sec. 8 of the Constitution of the United States.

In re Rahrer, 140 U. S. 545
Rhodes v. Iowa, 170 U. S. 412.
Silz v. Hesterberg, 211 U. S. 31.
Adams Express v. Kentucky, 214 U. S. 218.
Hill v. Hesterberg, 184 N. Y. 126.

II. The effect of the bill of complaint is to invade the sovereignty of the State of Montana in its internal affairs and to restrain in State courts the enforcement of State laws, criminal in effect.

Ex parte Young, 209 U. S. 123, 159.
Georgia v. Stanton, 73 U .S. 60.

III. No actual controversy between States is herein presented.

(a) No act or omission to act regarding any matter or thing involving property of Alabama, or denial of any valid request by Alabama, giving rise to a justiciable controversy is set forth.

Louisiana v. Texas, 176 U. S. 1, 16.

IV. The bill of complaint presents upon its face a misjoinder of causes of action and of defendants.

(a) There are separate classes of statutes in force in the eighteen defendant States, differing in the manner of control or restriction of prison made products. Variations among those classes of statutes are observed—

Bill—Appendix A—pp. 29-76.
Bill—Paragraph 12—p. 16.

(b) No joint action or enforcement is set forth which might possibly warrant the joinder of defendants.

V. There is now pending in the New York State Supreme Court, Albany County, an action in equity, entitled "Harry Greenthal v. John J. Bennett, Jr., as Attorney-General of the State of New York," which seeks to restrain the enforcement of both Ch. 26, L. 1933 of New York and the Act of Congress of Jan. 19, 1929 (Hawes-Cooper Act) 45 Stat. 1084 on the ground that both represent unconstitutional interferences with interstate commerce.

(a) This said case presents a real controversy, identical in effect with the bill of complaint herein, and which will probably be carried on appeal or writ of certiorari to this Court. Argument has been heard at Special Term, and decision is being awaited.

(b) The several States defendant in the instant petition may be heard to join, by submission of Amicus Curiae briefs, in said action, or may await individual test in proper manner.

VI. The State of Montana, in submitting this memorandum, does not desire to be understood as opposing a hearing upon the merits of the controversy sought to be presented by the petition and bill of complaint of Alabama herein. In the event that this honorable Court shall determine to permit the bill to be filed, the State of Montana begs leave to file an answer thereto and to present its evidence in proper manner to the end that the issues may be fairly adjudicated and speedily determined.

If this honorable Court shall decide that the petition and bill of complaint present no cause of action on the merits, the State of Montana prays a denial of the petition with costs.

Respectfully submitted,

RAYMOND T. NAGLE,
Attorney General,
State of Montana.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. Original.

STATE OF ALABAMA,
Plaintiff,

vs.

STATE OF ARIZONA, *et als.*,
Defendants.

In Equity.

Return of State of New Jersey to the Rule to Show Cause, and Supporting Brief.

WILLIAM A. STEVENS,
Attorney General,
Solicitor for Defendant,
State of New Jersey,
State House, Trenton, N. J.

DUANE E. MINARD,
Of Counsel.

October 9, 1933.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

INDEX

	Page
Return to Rule to Show Cause	1
Supporting Brief	4
Statement of Case	4
Argument	5
The Defendants are improperly joined	5
Necessary parties are omitted	5
Jurisdiction is lacking	6
No Justiciable Controversy is Presented	7
Conclusion	9

AUTHORITIES CITED.

TABLE OF CASES.

Ayres, Ex Parte, 123 U. S. 443	5
Fitts *v.* McGhee, 172 U. S. 516	5
Florida *v.* Mellon, 273 U. S. 12	8
Hammond Packing Co. *v.* Montana, 233 U. S. 331	8
Hebe Co. *v.* Shaw, 248 U. S. 297	8
Looney *v.* Crane Co., 245 U. S. 178	5
Minnesota *v.* No. Securities Co., 184 U. S. 199	5
Missouri K. & T. R. Co. *v.* Haber, 169 U. S. 163	8
South Carolina *v.* U. S., 199 U. S. 437	6
Williams *v.* U. S., 77 L. ed. 973	6
Young, Ex Parte, 209 U. S. 123	5

UNITED STATES CONSTITUTION.

Article III, Section 2	6

UNITED STATES STATUTES.

Hawes-Cooper Act (45 Stat. L. 1084)	8
Section 341 of Judicial Code (28 U. S. C. A. 171)	6

EQUITY RULES.

Equity Rule 26	5

NEW JERSEY LAWS.

N. J. P. L. 1926, p. 133	8

TEXT BOOKS.

Federalist No. VII	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. Original.

STATE OF ALABAMA, *Plaintiff,*	*In Equity.*
vs.	*Return of State of New Jersey to the Rule to Show Cause.*
STATE OF ARIZONA, *et als., Defendants.*	

The return of the defendant, State of New Jersey, to the Rule to Show Cause, granted herein on May 15, 1933 respectfully shows that:

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The defendant, State of New Jersey, by William A. Stevens, its Attorney General, makes return to the rule to show cause, granted herein on May 15, 1933, why leave should not be granted to file the bill of complaint in the above entitled cause, and respectfully represents that such leave should not be granted for the following reasons:

1. The complaint discloses no controversy between plaintiff and the State of New Jersey. It does not aver that any negotiations have ever been undertaken by plaintiff with this defendant for the adjustment of any controversy between them, or regarding any matter or thing or any act or omission of this defendant involving or affecting the property or rights of plaintiff, or that any demand or request has been made by plaintiff, or refused

by this defendant, with respect to the subject-matter of the complaint.

2. This defendant is improperly joined as a defendant herein, since the complaint alleges no liability or obligation on the part of this defendant toward the plaintiff, and the complaint unites separate causes of action claimed by plaintiff against 19 several states, including this defendant, under separate and distinct statutes of the same, respectively, all differing materially from each other in their provisions and requirements, and one Act of Congress for which the defendant state is not responsible.

3. No justifiable controversy is presented as between plaintiff and this defendant.

4. The bill of complaint fails to state a cause of action in that it fails to show:

(a) Any right of plaintiff to engage in the manufacture or sale in interstate commerce of commodities mentioned in the complaint.

(b) Any allegation that plaintiff is engaged in the manufacture and sale of commodities mentioned in the complaint.

(c) That any substantial damage will be suffered by plaintiff as the result of any action of this defendant.

(d) That certain of the commodities mentioned therein have ever been sold or transported in interstate commerce.

(e) Any discrimination against the commodities mentioned therein, moving in interstate commerce, in favor of such commodities moving in intrastate commerce, within the territorial limits of this defendant.

(f) Any legal injury resulting, or that can reasonably result, from the Act of Congress approved January 19th, 1929, copied as Appendix "B" to the complaint.

(g) Any legal injury resulting, or that can reasonably result, from the act of the Legislature of this defend-

ant, included in Appendix "A," at pages 60-2 of said complaint.

(h) Any present or threatened violation of plaintiff's rights under either the commerce clause of, or the Tenth Amendment to, the Constitution of the United States.

5. Plaintiff seeks by the prayer of its complaint to regulate such internal or local affairs of this defendant, and its exercise of the powers reserved to it under the Tenth Amendment of the Federal Constitution.

6. Plaintiff seeks, by the prayer of its complaint, to give extra-territorial effect to the regulation of its own internal affairs under powers claimed to be reserved to it under the Tenth Amendment of the Federal Constitution.

WHEREFORE this defendant prays that the plaintiff's petition for leave to file its bill of complaint herein be denied, with costs to this defendant.

WILLIAM A. STEVENS,
Attorney General,
Solicitor for Defendant,
State of New Jersey,
State House, Trenton, N. J.

DUANE E. MINARD,
Of Counsel.

October 9, 1933.

BRIEF IN SUPPORT OF THE FOREGOING ANSWER.

Statement of the Case.

This matter is now before the court on the return of a rule issued May 15, 1933, at the instance of the State of Alabama, directing the State of New Jersey, (and 18 other states) to show cause why the court should not grant plaintiff's motion, presented May 8, 1933, for leave to file a bill of complaint in an original action in equity against said states.

The complaint alleges:

That plaintiff owns large acreage producing agricultural products, and factories producing cotton fabrics and shirts by the use of prison labor, (*C. 12, pgf. 7*);

That plaintiff also contracts prison labor to a private corporation for the manufacture of shirts from cotton fabrics purchased from plaintiff (*C. 13, pgf. 8*);

That at the expiration of the existing agreement at the end of March of this year the private contractor refused to renew the contract for more than three months and then at a substantially reduced price for the material and labor furnished by plaintiff, whereby plaintiff suffered a loss in money (*C. 16, pgf. 11*);

That the cause of this loss, and of anticipated future similar losses, is the enacement of laws by defendant, New Jersey, and 11 other of the states, requiring products of prison labor sold therein to be identified by labels indicating such manufacture, and that 7 of the other defendant states have passed laws forbidding the sale therein of such products; (*C. 16-19, pgfs. 12-15*);

That said state laws conflict with the Commerce Clause of the Constitution of the United States (*C. 24, pgf. 21*).

Supporting Brief.

Plaintiff prays for a decree declaring the several state laws unconstitutional and void (*C. 25*), and for preliminary and permanent injunctions restraining the defendant states, and the persons in power under their authority, from enforcing the same.

ARGUMENT.

1.

The defendants are improperly joined.

The statutes of the several defendant states, printed in Appendix "A" of the complaint (*C. 29-76*), show an entire lack of uniformity. They are the laws of 19 separate states, separately, and differently, provisioned and enforced. There are two distinct classes, viz; those of the defendants, California, Colorado, Iowa, Kentucky, Minnesota, Montana, *New Jersey,* Ohio, Oklahoma, Oregon, Washington and Wisconsin which permit the sale of the products of prison labor but require them to be labeled to indicate that fact, and those of Idaho, Indiana, Michigan, New York, North Carolina, Pennsylvania and Arizona which forbid the sale of such products altogether.

It seems elementary that causes of action, if any, between different parties under different laws can be aptly treated only in different suits, *Equity Rule 26.*

2.

Necessary Parties are Omitted.

Plaintiffs allege that the state laws are unconstitutional. If so they are not acts of the state, and only those who attempt to enforce them can be restrained. *Ex Parte Ayres, 123 U. S. 443; Fitts* v. *McGhee, 172 U. S. 516; Ex Parte Young, 209 U. S. 123; Looney* v. *Crane Co., 245 U. S. 178; Minn.* v. *No. Securities Co., 184 U. S. 199.*

3.

Jurisdiction is Lacking.

Unquestionably the court has jurisdiction to entertain a suit by one state against another in any justiciable controversy touching the safety, peace and sovereignty of a state. No sovereign rights are involved in this suit. The right, if any, to manufacture cotton fabrics or shirts, to grow and ship potatoes or to contract to furnish cotton fabric and prison labor (as involved in this case) are not rights pertaining to sovereignty. They are private functions of an extra-governmental nature exercised in the same manner as if by a private corporation. *South Carolina* v. *U. S., 199 U. S. 437, 461.*

The complaint discloses no constitutional authority in plaintiff to engage in these purely commercial pursuits. The Commerce Clause of the Constitution was never designed to protect the right of sovereign states to *engage* in the interstate commerce of merchandise. The history of that clause shows it was designed for the opposite purpose of *preventing* the states from interfering with the interstate commerce of *private citizens. Federalist No. VII.* That clause must be construed with respect to both language and application as of the time of its adoption. *Williams* v. *U. S., 77 L. ed. 973-5.* In the language of *Mr. Justice* Southerland in that case plaintiff's present claim of right under the Commerce Clause "would be to strain the constitution to a construction never imagined or dreamed of," (*p. 795*).

If the subject matter of this suit is a private commercial enterprise conducted, as admitted, for profit, a serious question is presented whether plaintiff, under the guise of its sovereignty, may obtain original jurisdiction here under either Article III, Section 2 of the Constitution, or Section 341 of the Judicial Code (*28 U. S. C. A. 171*).

Plaintiff stands in no different position from a private manufacturer. If the New Jersey law in question (*C. 60, Appendix "A"*) does not (and it does not) discriminate against plaintiff in favor of other manufacturers who offer similar products for sale in New Jersey, and places no discriminatory tax or other burden thereon, as compared with intrastate commerce in similar commodities, there is no just cause of complaint, and such a complaint made by a state gives it no quality superior to that of a private citizen.

4.

No Justiciable Controversy is Presented.

Plaintiff claims damage to a manufacturing enterprise and a contractual relation of a strictly private nature, stated in dollars and cents. New Jersey is under no obligation, in the regulation of its purely internal affairs, to preserve to plaintiff private commercial contracts however profitable, and the enforcement of its purely regulatory laws in the exercise of its police power do not present a justiciable controversy between it and plaintiff.

The primary essential of a justiciable controversy is a right which is invaded or immediately threatened. What right has plaintiff to have the sale of its prison made products facilitated in New Jersey? The law in question does not prevent the shipment into, or the sale of such products in, New Jersey. It merely requires that products of convict or prison labor in New Jersey, or of other states brought into New Jersey, shall be branded and labelled to show that they are convict made and where they were made. This act treats the products of New Jersey's own prisons in exactly the same manner as it treats those of other states (*C. 60-1*).

If plaintiff has the right (not disclosed in the complaint) to engage in the interstate commerce of ordinary

merchandise, it can have no rights superior to any other individual or corporation similarly engaged. The New Jersey law was enacted in 1926 (*N. J. P. L. 1926, pp. 133-4*) and has not been the cause of complaint for seven years. It constitutes a regulation of the internal affairs of New Jersey under its police power differing in nowise from its laws respecting animal quarantine, the sale of oleomargerine, standard weights and measures, the sale of pure foods or drugs, the practice of medicine, dentistry or nursing, or any other of the many regulations by statute (too numerous to mention), of the health, safety or morals of its inhabitants. Such statutory regulations have been sustained by this court as proper subjects of internal governmental regulation. *Hebe Co.* v. *Shaw, 248 U. S. 297; Hammond Packing Co.* v. *Montana, 233 U. S. 331; Missouri K. & T. R. Co.* v. *Haber, 169 U. S. 163.*

Every injury has not its redress. Acts passed within the constitutional power, how'ere damaging in their affect, afford no right of redress. There must be a wrong furnishing a ground for judicial redress, or a right susceptible of judicial enforcement. Neither is present here. (*Florida* v. *Mellon,* 273 U. S. 12, 16-7).

Plaintiff claims that the Act of Congress, known as the Hawes-Cooper Act (*45 Stat. L. 1084*) is unconstitutional because it

> "undertakes to control the plaintiff in the exercise of its police power over the employment and occupation of its prison population, *to invade the control by the plaintiff of a matter purely local in its character and to destroy the sovereignty of the plaintiff in the exercise of police powers reserved to it under the Tenth Amendment to the Constitution.*" (Italics ours.)

That is precisely our answer to this attempt of plaintiff in this suit to invade or control the purely internal or local affairs of this defendant. There is no right

claimed by plaintiff and no redress prayed by it that would not invade the rights of this defendant under the same constitutional amendment.

Conclusion.

Wherefore the defendant, State of New Jersey, prays that plaintiff's motion for leave to file its bill of complaint be denied.

Respectfully submitted,

WILLIAM A. STEVENS,
Attorney General,
Solicitor for Defendant,
State of New Jersey,
State House, Trenton, N. J.

DUANE E. MINARD,
Of Counsel.

October 9, 1933.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1932

No. Original

STATE OF ALABAMA,
Plaintiff,
vs.
STATE OF ARIZONA, ET AL.,
Defendants.
In Equity

RETURN TO SHOW-CAUSE ORDER DATED MAY, 15, 1933, SUBMITTED ON BEHALF OF STATE OF NEW YORK, DEFENDANT.

JOHN J. BENNETT, JR.,
Attorney-General,
State of New York.

HENRY EPSTEIN,
Solicitor-General,
State of New York,
Solicitor and Counsel.

CASES CITED

	PAGE
Adams Express v. Kentucky, 214 U. S. 218	4
Albright v. Bd. of Comm'rs, 194 Pac. 913 (1921) (Kansas)	2
Clark Distilling Co. v. Western Md. R. R. Co., 242 U. S. 311 (1917)	2
Ex Parte Young, 209 U. S. 123, 159	4
Georgia v. Stanton, 73 U. S. 60	4
Hill v. Hesterberg, 184 N. Y. 126	4
Hipolite Egg Co. v. U. S. 220 U. S. 45	2
In re Rahrer, 140 U. S. 545 (1891)	2, 4
Louisiana v. Texas, 176 U. S. 1, 16	4
Rhodes v. Iowa, 170 U. S. 412, 420 (1898)	2, 4
Scott v. Frazier, 258 Fed. 699, 671 (Decided, 1920, on another point in 253 U. S. 243)	2
Silz v. Hesterberg, 211 U. S. 31 (1908)	2, 4

STATUTES CITED

Chap. 26, Laws 1933 of New York	2, 3, 4
Chap. 136, Laws 1930 of New York	3, 4
Sec. 69 General Business Law of New York	3
45 Stat. 1084	2, 4

CONSTITUTIONAL PROVISIONS CITED

Art. I, Sec. 8, Cl. 3, Constitution of U. S.	2, 4

Supreme Court of the United States

October Term, 1932

No. , Original

STATE OF ALABAMA, *Plaintiff*, vs. STATE OF ARIZONA, *et al.*, *Defendants.*	In Equity

RETURN SUBMITTED ON BEHALF OF STATE OF NEW YORK ON APPLICATION OF STATE OF ALABAMA FOR PERMISSION TO FILE BILL OF COMPLAINT.

And now comes the State of New York, and in return to the show cause order under date of the fifteenth day of May, 1933, why leave to file the bill of complaint against the said State of New York should not be granted, says:

The State of New York does not object to a determination upon the merits of the controversy sought to be adjudicated by the petition herein, nor does the State of New York desire to interpose needless obstacles to such result. There are, however, considerations of consequence which weigh heavily against the granting of the petition herein and against a determination of the issues on the basis of the complaint herein. Briefly stated, these considerations are:

I. No constitutional right guaranteed to Alabama by the Constitution of the United States is violated or threatened with violation by the acts alleged in the bill of complaint sought to be filed.

(a) The Fourteenth Amendment to the Constitution of the United States does not encompass the State of Alabama as such within its protection, and the due process or equal protection clauses thereof may not be availed of by the State of Alabama.

Scott v. Frazier, 258 Fed. 669, 671. (Decided, 1920, on another point in 253 U. S. 243.)

Albright v. Bd. of Comm'rs, 194 Pac. 913 (1921)—Kansas.

(b) The Act of Congress of Jan. 19, 1919, 45 Stat. 1084 (Complaint, p. 77), known as The Hawes-Cooper Act, does not violate the interstate commerce clause of the Constitution of the United States, nor does it constitute an imposition of an invalid burden upon commerce among the States. It is a proper exercise of the regulatory power of Congress over interstate commerce (Art. I, Sec. 8, Clause 3).

In re Rahrer, 140 U. S. 545 (1891)

Rhodes v. Iowa, 170 U. S. 412, 420 (1898)

Clark Distilling Co. v. Western Md. R. R. Co., 242 U. S. 311 (1917)

Siltz v. Hesterberg, 211 U. S. 31 (1908)

Hipolite Egg Co. v. U. S. 220 U. S. 45.

(c) The provisions of Ch. 26, Laws of 1933 of New York, with the exception of governmental use, place no greater degree of restriction upon the sale in New York of Alabama prison made goods than upon those of New York or other states. *See NOTE.

* NOTE: The Statute of New York set forth at page 62 of the complaint, Ch. 136 L. 1930, constituting § 69 of the General Business Law of New York, was amended by Ch. 26, L. 1933, to read as follows:

"An Act to amend the general business law, in relation to the sale of convict made goods.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. In order to protect free labor from the unjust competition of convict labor and conditions at present warranting the exercise of the sovereign power of the state in enacting this amendment, section sixty-nine of chapter twenty-five of the laws of nineteen hundred and nine, entitled 'An act relating to general business, constituting chapter twenty of the consolidated laws,' as added by chapter one hundred and thirty-six of the laws of nineteen hundred and thirty, is hereby amended to read as follows:

§ 69. Sale of convict made goods [manufactured or mined in other states]. No goods, wares, or merchandise, manufactured, produced or mined wholly or in part by convicts or prisoners [of other states], except convicts or prisoners on parole or probation, shall be [shipped] sold in [to] this state [to be sold on the open market, or sold to, or exchanged, with an institution of this state or with any of its political subdivisions] to any person, firm, association or corporation except that nothing in this section shall be construed to forbid the sale of such goods produced in the prison institutions of this state to the state, or any political division thereof, or to any public institution owned or managed and controlled by the state, or any political division thereof as provided in section one hundred eighty-four of the correction law.

§ 2. This act shall take effect January nineteenth, nineteen hundred thirty-four."

(Parentheses indicate old statute).

New York stipulates that this statute may be read into the complaint in lieu of Ch. 136, L. 1930 set forth at pp. 62-3 thereof.

(d) Ch. 26, L. 1933 of New York, read in conjunction with the Act of Congress of January 19, 1929, 45 Stat. 1084, does not violate the provisions of Art. I, sec. 8 of the Constitution of the United States.

In re Rahrer, 140 U. S. 545.

Rhodes v. Iowa, 170 U. S. 412.

Silz v. Hesterberg, 211 U. S. 31.

Adams Express v. Kentucky, 214 U. S. 218.

Hill v. Hesterberg, 184 N. Y. 126.

II. The effect of the bill of complaint is to invade the sovereignty of the State of New York in its internal affairs and to restrain in State courts the enforcement of State laws, criminal in effect.

Ex parte Young, 209 U. S. 123, 159.
Georgia v. Stanton, 73 U. S. 60.

III. No actual controversy between states is herein presented.

(a) No act or omission to act regarding any matter or thing involving property of Alabama, or denial of any valid request by Alabama, giving rise to a justiciable controversy is set forth.

Louisiana v. Texas, 176 U. S. 1, 16.

IV. The bill of complaint presents upon its face a misjoinder of causes of action and of defendants.

(a) There are separate classes of statutes in force in the eighteen defendant States, differing in the manner of control or restriction of prison made products. Variations among those classes of statutes are observed—

Bill—Appendix A—pp. 29–76.
Bill—Paragraph 12—p. 16.

(b) No joint action or enforcement is set forth which might possibly warrant the joinder of defendants.

V. There is now pending in the New York State Supreme Court, Albany County, an action in equity, entitled "*Harry Greenthal v. John J. Bennett Jr., as Attorney-General of the State of New York,*" which seeks to restrain the enforcement of both Ch. 26, L. 1933 of New York and the

Act of Congress of Jan. 19, 1929 (Hawes-Cooper Act) 45 Stat. 1084 on the ground that both represent unconstitutional interferences with interstate commerce.

(a) This said case presents a real controversy, identical in effect with the bill of complaint herein, and which will probably be carried on appeal or writ of certiorari to this Court. Argument has been heard at Special Term, and decision is being awaited.

(b) The several states defendant in the instant petition may be heard to join by submission of Amicus Curiae briefs in said action, or may await individual test in proper manner.

The State of New York, in submitting this return does not desire to be understood as opposing a hearing upon the merits of the controversy sought to be presented by the petition and bill of complaint of Alabama herein. In the event that this honorable Court shall determine to permit the bill to be filed, New York begs leave to file an answer thereto and to present its evidence in proper manner to the end that the issues may be fairly adjudicated and speedily determined.

If this honorable Court shall decide that the petition and bill of complaint present no cause of action on the merits, New York State prays a denial of the petition with costs.

Respectfully submitted,

JOHN J. BENNETT, JR.,
Attorney-General,
State of New York.

HENRY EPSTEIN,
Solicitor-General.
Solicitor and Counsel.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. Original

STATE OF ALABAMA, Plaintiff,

vs.

THE STATES OF ARIZONA, CALIFORNIA, COLORADO, IDAHO, INDIANA, IOWA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, WASHINGTON, and WISCONSIN, Defendants.

IN EQUITY

RETURN OF THE STATE OF NORTH CAROLINA

To Rule to Show Cause why leave to file Bill of Complaint heretofore tendered should not be granted to Plaintiff, the State of Alabama.

DENNIS G. BRUMMITT,
Attorney General of North Carolina,

AUTHORITIES CITED

	PAGE
Albright v. Board of Commissioners, 194 Pac., 913	2
Mass. v. Mellon, 261 U. S., 447, 67 L. ed., 1078	4
Scott v. Frazier, 258 Fed., 669, 671	2
Simpson v. Shepard, 230 U. S., 352, 57 L. ed., 1511	3
Sligh v. Kirkwood, 237 U. S., 52, 59 L. ed., 835	3
State of La. v. State of Texas, 176 U. S., 1, 16, 44 L. ed., 347	4
Wilmington Transportation Co. v. R. R. Commission, 236 U. S., 151, 59 L. ed., 508	3
12 C. J., p. 16	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. Original

STATE OF ALABAMA, Plaintiff,

vs.

THE STATES OF ARIZONA, CALIFORNIA, COLORADO, IDAHO, INDIANA, IOWA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, WASHINGTON, and WISCONSIN, Defendants.

IN EQUITY

RETURN OF THE STATE OF NORTH CAROLINA

To Rule to Show Cause why leave to file Bill of Complaint heretofore tendered should not be granted to Plaintiff, the State of Alabama.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the State of North Carolina, by Dennis G. Brummitt, its Attorney General, in return to the Order

to Show Cause under date of May 15, 1933, and files its objections to the granting of leave to file the plaintiff's Bill of Complaint, for that

(1)

No right guaranteed to the State of Alabama by the Constitution of the United States is violated or threatened with violation by the acts alleged in the Bill of Complaint sought to be filed.

Scott v. Frazier, 258 Fed., 669, 671.
Albright v. Board of Com'rs, 194 Pac., 913.

(2)

There is a misjoinder of causes of action and of parties defendant, since there are radical differences in the laws of the several defendant states with respect to the manner of control of, or restrictions upon, prison-made products, and no joint action is alleged on the part of the several defendant states, either in the enactment of such laws or their enforcement.

(3)

It appears from the Bill of Complaint as tendered that the said suit is, partly at least, for the benefit and protection of the East Coast Manufacturing Company and Gordon East Coast Company in the purchase of prison-made goods from the plaintiff, the State of Alabama, and in effect said companies are two of the real parties in interest in this suit.

(4)

The provisions of Chapter 146, Public Laws of North Carolina, Session of 1933 (see Appendix A), and the Act of Congress, January 19, 1919, 45 Stat., 1084, known as the Hawes-Cooper Act, are not violative of the Commerce Clause of the United States Constitution, Article I, Sec-

tion 8.3, as the Constitution does not regulate interstate commerce, but only gives Congress the right and power to do so. The extent to which Congress may go in any direction in regulating interstate commerce is largely optional, and generally, until it enters the field and after it withdraws therefrom, the State may act.

Simpson v. Shepard, 230 U. S., 352, 57 L. ed., 1511.
Wilmington Transportation Co. v. Railroad Commission, 236 U. S., 151, 59 L. ed., 508.
Sligh v. Kirkwood, 237 U. S., 52, 59 L. ed., 835.
12 C. J., p. 16.

(5)

The Hawes-Cooper Act constitutes a positive regulation by the Congress with respect to convict-made goods, the purpose and intent of which is to subject the handling of such goods, within the State, to State control.

(6)

The provisions of the North Carolina statute complained of (see Appendix A), with the exception of governmental use, places no greater degree of restriction upon the sale in North Carolina of Alabama prison-made goods than upon those of North Carolina, or other states, Section 3 thereof specifically providing as follows:

"Sec. 3. That this act shall apply equally to convict or prison-made goods, wares or merchandise, whether manufactured, produced, or mined within or without the State of North Carolina."

(7)

The State of Alabama in said suit seeks to project its sovereignty beyond its borders and within the State of North Carolina, to invade the sovereignty of the State of

North Carolina with respect to its internal affairs, and to prevent the enforcement within said State of its laws, criminal in effect.

(8)

No justiciable controversy between the State of Alabama and the State of North Carolina is presented upon the allegations as contained in the tendered bill of complaint.

State of La. v. State of Texas, 176 U. S., 1, 16, 44 L. ed., 347.

Mass. v. Mellon, 261 U. S., 447, 67 L. ed., 1078.

(9)

The State of Alabama in the conduct of its manufacturing operations as set forth and described in the tendered bill of complaint, is engaged in the production of prison-made products as a commercial enterprise. Under such circumstances it is subjected to the same rules of law as any ordinary non-governmental agency. By the Hawes-Cooper Act the Congress declared the public policy of the United States in relation to prison-produced commodities. The act of the General Assembly of North Carolina complained of, said Chapter 146, Public Laws of 1933, is a declaration of the public policy of that State, enacted in pursuance of its right and power to regulate trade and commerce therein so as to promote the social and economic well-being of its people.

If this Honorable Court shall decide that the petition and tendered bill of complaint present no cause of action on the merits, the State of North Carolina prays the denial of the petition with costs. In the event that this Honorable Court shall see fit to allow the filing of the bill of complaint, the State of North Carolina prays that

it be granted leave to file its answer and present its defenses, to the end that the issues may be fairly adjudicated and speedily determined.

Respectfully submitted,

This October 9, 1933.

DENNIS G. BRUMMITT,
Attorney General of North Carolina.

APPENDIX A

Public Laws of North Carolina,

Session of 1933

S. B. 138 CHAPTER 146

AN ACT TO PROHIBIT THE SALE OF CONVICT-MADE GOODS

The General Assembly of North Carolina do enact:

SECTION 1. That except as hereinafter provided, the sale anywhere within the State of North Carolina of any and all goods, wares and merchandise manufactured, produced or mined wholly or in part by convicts or prisoners, except by convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions is hereby prohibited and declared to be unlawful.

SEC. 2. That the provisions of this act shall not apply to sales or exchanges between the State Penitentiary and other penal, charitable, educational and/or custodial institutions, maintained wholly or in part by the State, or its political subdivisions, for use in said institutions or by the wards thereof; nor shall the provisions of this act apply to the sale of cotton, corn, grain, or other processed or unprocessed agricultural products, including seed for growing purposes, or to the sale of stone quarried by convict labor, or to the sale of coal or chert mined by convict labor, in any mine operated by the State: *Provided*, that this section shall apply with equal force to sales to the State or any political subdivision thereof by any State penal or correctional institution, including the State Highway: *Provided further*, that the State of North Carolina shall have the right of manu-

facturing in any of its penal or correctional institutions products to be used exclusively by the State or any of its agencies.

SEC. 3. That this act shall apply equally to convict- or prison-made goods, wares or merchandise, whether manufactured, produced or mined within or without the State of North Carolina.

SEC. 4. Any person, firm or corporation selling, undertaking to sell, or offering for sale any such prison-made or convict-made goods, wares or merchandise, anywhere within the State, in violation of the provisions of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to fine or imprisonment, or both, in the discretion of the Court. Each sale or offer to sell, in violation of the provisions of this act, shall constitute a separate offense.

SEC. 5. All laws and clauses of laws in conflict with this act are hereby repealed.

SEC. 6. This act shall be in force from and after the nineteenth day of January, 1934.

Ratified this the 13th day of March, A.D. 1933.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. ..... Original.

STATE OF ALABAMA,
Plaintiff,

vs.

STATE OF ARIZONA, ET AL.,
Defendants.

RETURN OF STATE OF OHIO TO RULE TO SHOW CAUSE WHY LEAVE TO FILE BILL OF COMPLAINT SHOULD NOT BE GRANTED TO PLAINTIFF, THE STATE OF ALABAMA.

JOHN W. BRICKER,
Attorney General of Ohio,
Counsel for the Defendant, the State of Ohio, State House, Columbus, Ohio.
W. DALE DUNIFON,
PERRY L. GRAHAM,
Of Counsel.

TOOTHAKER & RODENFELS, Law Printers, Columbus, Ohio.

TABLE OF CASES.

American Mfg. Co. v. City of St. Louis, 250 U. S., 459 6
Cominetti v. U. S., 242 U. S., 470 9
Coe v. Errol, 116 U. S., 517, 525 7
Cornell v. Coyne, 192 U. S., 418, 428 6
Delaware L. & W. R. R. Co. v. Yurkonis, 238 U. S., 439 6
Re Greene, 52 Fed., 113 8
Hammer v. Dagenhart, 247 U. S., 251, 272 6, 8
Heisler v. Thomas Colliery Coal Co., 260 U. S., 245 6
Hope Natural Gas Co. v. Hall, 274 U. S., 282 6
James Clark Distillery Co. v. Western Maryland R. R. Co., 242 U. S., 311 9
Kidd v. Pearson, 128 U. S., 1, 24 6
N. Y. C. Co. v. White, 243 U. S., 188 9
Plymouth Coal Co. v. Pennsylvania, 232 U. S., 513 9
United Mine Workers of Am. v. Coronado Coal Co., 259 U. S., 32 4, 407 6
United States v. E. C. Knight, 156 U. S. 1 5
Western Cartridge Co. v. Emerson, 258 U. S., 290 6
Wilkerson v. Rohrer, 140 U. S., 454 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. ..... Original.

STATE OF ALABAMA,

Plaintiff,

vs.

STATE OF ARIZONA, ET AL.,

Defendants.

RETURN OF STATE OF OHIO TO THE RULE TO SHOW CAUSE.

To the Honorable Supreme Court of the United States:

The defendant, state of Ohio, by John W. Bricker, its attorney general, makes return to the rule to show cause, granted herein on May 15, 1933, why there should not be granted to the plaintiff leave to file the bill of complaint in the above entitled cause, and respectfully shows that such leave should not be granted for the following reasons:

1. The bill of complaint lodged with the clerk of this honorable court shows that the bill of complaint violates Equity Rule No. 37, in that such rule provides:

"Every action shall be prosecuted in name of the real party in interest * * *."

(Exceptions not applicable to the case at bar.) The plaintiff does not allege that it is engaged in interstate commerce and does not show any direct interest of the state of Alabama concerning which it seeks to enjoin the enforcement.

2. The bill of complaint lodged with the clerk does not show that the plaintiff's own rights are infringed by the matters complained of.

3. The bill of complaint does not show a justiciable cause of action.

Wherefore, this defendant prays that the plaintiff's petition for leave to file its bill of complaint herein, be denied with costs to this defendant.

JOHN W. BRICKER,
Attorney General of Ohio,
Counsel for the Defendant, the State of Ohio, State House, Columbus, Ohio.
W. DALE DUNIFON,
PERRY L. GRAHAM,
Of Counsel.

BRIEF.

STATEMENT OF THE CASE.

This matter is now before the court on return of a ruling issued by this court under date of May 15, 1933, at the instance of the state of Alabama, directing the state of Ohio, along with certain other states, to show cause why the court should not grant the plaintiff's petition presented on May 8, for leave to file a bill of complaint in an original action in equity against such states.

The complaint alleges:

That the plaintiff owns large acreage producing certain agricultural products, to wit: cotton and potatoes, (p. 12, pgf. 7);

The petition further alleges that plaintiff owns cotton mills and a shirt factory in which it manufactures shirts, by virtue of a contract with the Gordon East Coast Company (pp. 12 and 13, pgfs. 7 and 8);

The petition further alleges plaintiff sold the shirts to the Gordon East Coast Company as, and when manufactured by prisoners of the plaintiff, (p. 14, lines 20 to 30);

That by reason of the statutes described in Exhibit "A" attached to such petition, plaintiff is unable to enter into an advantageous contract for the sale in Alabama of the articles produced on its farms and in its manufacturing plant;

That such state laws and federal laws set forth in such Exhibit "A" conflict with the commerce clause of the Constitution of the United States.

Plaintiff's prayer is that a decree be rendered by this court declaring the state and federal statutes set forth in Plaintiff's Exhibit "A" to be unconstitutional and void, and that a preliminary and permanent injunction be granted, restraining the defendant states from enforcing such statutes.

ARGUMENT.

1.

The Plaintiff Is Not the Real Party In Interest.

The plaintiff, in his bill of complaint, seeks to restrain the enforcement of certain statutes regulating the sale of prison-made or prison-produced commodities manufactured or raised by means of prison labor. The contention of the plaintiff is that these statutes are void by reason of the fact that they interfere with, or are a burden upon interstate commerce. There is no allegation in the plaintiff's petition that the state of Alabama is either engaged in, is desirous of engaging in, or is about to engage in interstate commerce. The allegations of the plaintiff's petition are to the effect that it is engaged in the manufacture of certain articles of clothing which it sells to a purchaser in the state of Alabama allegedly for the purpose of sale in interstate commerce and further, that it raises certain agricultural materials which subsequently find their way into interstate commerce.

2.

Manufacture Is Not Commerce.

As stated by Mr. Chief Justice Fuller in United States v. E. C. Knight, 156 U. S., 1, on page 12:

"Commerce begins after manufacture ends."

And further, on page 13:

> "The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce."

It has been repeatedly held by this court that manufacture of articles for the purpose of exporting such articles to other states is not interstate commerce.

Kidd v. Pearson, 128 U. S., 1, 24;
Cornell v. Coyne, 192 U. S., 418, 428;
Western Cartridge Company v. Emerson, 258 U. S., 290;
American Manufacturing Company v. City of St. Louis, 250 U. S., 459.

It has been further held by this court that the mining of coal with the intention that it be shipped and sold in other states, is not interstate commerce.

Heisler v. Thomas Colliery Coal Company, 260 U. S., 245;
Hammer v. Dagenhart, 247 U. S., 251, 272;
United Mine Workers of America v. Coranodo Coal Company, 259 U. S., 324; 407;
Delaware L. & W. R. R. Company v. Yurkonis, 238 U. S., 439.

This court has further held that the production of gas in a state, even though such production was for the purpose of transporting the gas produced to other states for sale, was not interstate commerce.

Hope Natural Gas Company v. Hall, 274 U. S., 282.

Agricultural products, although raised for the purpose of sale in another state than that in which they were raised, do not become articles of interstate commerce until actually started on their journey to another state. Mr. Justice Bradley, in delivering the opinion of the court in the case of Coe v. Errol, 116 U. S., 517, at page 525, stated:

> "When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an **entrepot** for that particular region, whether on a river or a line of railroad, such products are not yet exports nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination or have started on their ultimate passage to that state."

And on page 528:

> "Certainly, as long as these products are on the lands which produce them, they are part of the general property of the state. And so we think they continue to be until they have entered upon their final journey for leaving the state and going into another state. It is true, it was said in the case of The Daniel Ball, 10 Wall., 565 (77 U. S. bk., 19 L. ed., 1002): 'Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of prepara-

> tion and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm or the forest to the depot is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether **in fieri**, and not at all a fixed and certain thing."

As stated by Mr. Justice Jackson, in the case of Re: Greene, 52 Fed., 113:

> "When commerce begins is determined not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state."

Quoted by Mr. Justice Day, in Hammer v. Dagenhart, 247 U. S., 251, 272.

The acts alleged in the bill of complaint, to be performed by the plaintiff do not therefore constitute a part of interstate commerce. The interstate commerce, if any, which is, or might be injured by the acts complained of would be that of the Gordon East Coast Company and not of the state of Alabama.

3.

The Bill of Complaint Does Not Show That Plaintiff's Own Rights Are Infringed.

It has been repeatedly held by this court that the bill of complaint must show that the plaintiff's own rights are infringed by the acts complained of in order to entitle the plaintiff to maintain his action in this court. N. Y. C. Co. v. White, 243 U. S., 188; Plymouth Coal Company v. Pennsylvania, 232 U. S., 513. The only allegation of injury to commerce in plaintiff's petition is an alleged injury to the commerce conducted by the Gordon East Coast Company and not by the plaintiff.

The petition states no cause of action which is justiciable. This court has many times had before it the same question of law as that attempted to be presented by the plaintiff. In the case of Wilkerson v. Rahrer, 140 U. S., 545, this court had before it a similar question construing a similar federal statute and similar state statutes with reference to the sale of intoxicating liquors, and in such case the court laid down the rule that sale after transportation was subject to state regulation or restriction.

See, also:

James Clark Distillery Company v. Western Maryland R. R. Company, 242 U. S., 311;
Caminetti v. United States, 242 U. S., 470.

CONCLUSION.

It is therefore submitted that the bill of complaint of the plaintiff shows that the plaintiff is not the proper party plaintiff to adjudicate the cause of action, if any, purported to be alleged in the plaintiff's bill of complaint; that the plaintiff is not the real party in interest, and further that no cause of action justiciable is presented by the bill of complaint.

Wherefore, the defendant, state of Ohio, prays that the plaintiff's petiton for leave to file its bill of complaint be denied.

JOHN W. BRICKER,
Attorney General of Ohio,
Counsel for the Defendant, the State of Ohio, State House, Columbus, Ohio.
W. DALE DUNIFON,
PERRY L. GRAHAM,
Of Counsel.

FILE COPY

IN THE

Supreme Court of the United States

IN EQUITY

No. ——— Original

OCTOBER TERM, 1932

THE STATE OF ALABAMA, *Plaintiff*,

v.

THE STATES OF ARIZONA, CALIFORNIA, COLORADO, IDAHO, INDIANA, IOWA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, WASHINGTON AND WISCONSIN, *Defendants*.

RETURN SUBMITTED ON BEHALF OF STATE OF OREGON ON APPLICATION OF STATE OF ALABAMA FOR PERMISSION TO FILE BILL OF COMPLAINT

I. H. VAN WINKLE,
Attorney-General of Oregon.

AUTHORITIES CITED

	PAGE
Adams Express v. Kentucky, 214 U. S. 218	5
Albright v. Bd. of Comm'rs, 194 Pac. 913 (1921), Kansas	2
Clark Distilling Co. v. Western Md. R. R. Co., 242 U. S. 311 (1917)	3
Ex parte Young, 209 U. S. 123, 159	5
Georgia v. Stanton, 73 U. S. 60	5
Hill v. Hesterberg, 184 N. Y. 126	5
Hipolite Egg Co. v. U. S., 220 U. S. 45	3
In re Rahrer, 140 U. S. 545 (1891)	3, 5
Louisiana v. Texas, 176 U. S. 1, 16	5
Roades v. Iowa, 170 U. S. 412, 420 (1898)	3, 5
Scott v. Frazier, 258 Fed. 669, 671 (Decided, 1920, on another point in 253 U. S. 243)	2
Silz v. Hesterberg, 211 U. S. 31 (1908)	3, 5

OREGON LAWS

Chapter 21, Oregon Laws, 1911 (Sections 67-2010 to 67-2014, both inclusive, Oregon Code 1930)	3, 4
Chapter 133, Oregon Laws, 1929 (Sections 59-402 and 59-403, Oregon Code 1930)	3

IN THE

Supreme Court of the United States

IN EQUITY

No. ——— Original

OCTOBER TERM, 1932

THE STATE OF ALABAMA, *Plaintiff*,

v.

THE STATES OF ARIZONA, CALIFORNIA, COLORADO, IDAHO, INDIANA, IOWA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, WASHINGTON AND WISCONSIN, *Defendants.*

RETURN SUBMITTED ON BEHALF OF STATE OF OREGON ON APPLICATION OF STATE OF ALABAMA FOR PERMISSION TO FILE BILL OF COMPLAINT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

And now comes the State of Oregon, and in return to the show cause order under date of the fifteenth day of May, 1933, why leave to file the bill of complaint against the said State of Oregon should not be granted, says:

The State of Oregon does not object to a determination upon the merits of the controversy sought to

be adjudicated by the petition herein, nor does the State of Oregon desire to interpose needless obstacles to such result. There are, however, considerations of consequence which weigh heavily against the granting of the petition herein and against a determination of the issues on the basis of the complaint herein. Briefly stated, these considerations are:

I.

No constitutional right guaranteed to Alabama by the Constitution of the United States is violated or threatened with violation by the acts alleged in the bill of complaint sought to be filed.

(a) The Fourteenth Amendment to the Constitution of the United States does not encompass the State of Alabama as such within its protection, and the due process or equal protection clauses thereof may not be availed of by the State of Alabama.

Scott v. Frazier, 258 Fed. 669, 671. (Decided, 1920, on another point in 253 U. S. 243.)

Albright v. Bd. of Comm'rs, 194 Pac. 913 (1921), — Kansas.

(b) The Act of Congress of Jan. 19, 1929, 45 Stat. 1084 (Complaint, p. 77), known as the Hawes-Cooper Act, does not violate the interstate commerce clause of the Constitution of the United States (Art. I, Sec. 8, Cl. 3), nor does it constitute an imposition of an invalid burden upon commerce among

the States. It is a proper exercise of the regulatory power of Congress over interstate commerce.

In re Rahrer, 140 U. S. 545 (1891).
Rhodes v. Iowa, 170 U. S. 412, 420 (1898).
Clark Distilling Co. v. Western Md. R. R. Co., 242 U. S. 311 (1917).
Silz v. Hesterberg, 211 U. S. 31 (1908).
Hipolite Egg Co. v. U. S., 220 U. S. 45.

(c) The provisions of the laws of Oregon, with the exception of the regulation for the protection of the public health, place no greater degree of restriction upon the sale in Oregon of Alabama prison-made goods than upon those of Oregon, nor in any respect than those of other states.

NOTE: In addition to the statute of the State of Oregon set forth at page 70 of the Bill of Complaint, Chapter 133, Oregon Laws 1929, constituting Sections 59-402 and 59-403, Oregon Code 1930, the Oregon statutes include Chapter 21, Oregon Laws, 1911, constituting Sections 67-2010 to 67-2014, both inclusive, Oregon Code 1930, reading as follows:

"67-2010. All goods, wares and merchandise, made by convict labor in any penitentiary, prison, reformatory, or other establishment in which convict labor is employed shall, before being exposed for sale, be branded, labeled or marked as hereinafter provided, and shall not be exposed for sale in any place within the state without such brand, label or mark.

"67-2011. The brand, label or mark hereby required shall contain at the head or top thereof the words 'Convict-made', followed by the year

and name of the penitentiary, prison, reformatory, or other establishment in which it was made, in plain English lettering of the style and size known as 'Great Primer Roman Capitals'. The brand or mark shall in all cases, where the nature of the article will permit, be placed upon the same, and only where such branding and marking is impossible shall it be placed upon the box or other covering of the same, or be attached to the article as a label. Said brand or mark shall be placed upon the most conspicuous part of the article or its covering, and said label, when used instead of a brand or mark, shall be attached in the most conspicuous place.

"67-2012. It shall not be lawful for any person in this state dealing in any such convict-made goods, wares or merchandise, to have the same in his possession for the purpose of sale, or offer the same for sale, without the brand, mark or label required by this act, or to remove or to deface such mark, brand or label.

"67-2013. Any person offending against the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay a fine not exceeding $1,000 or be imprisoned for a term not exceeding one year, or both such fine and imprisonment, in the discretion of the court.

"67-2014. This act shall not apply to any goods, wares or merchandise now or hereafter made in the state of Oregon by convict labor under any now existing contract between the state of Oregon and any individuals or corporation or corporations until after the expiration of such contract".

Oregon stipulates that this statute may be read into the bill of complaint in addition to Chapter 133, Oregon Laws, 1929, set forth at page 70 thereof.

(d) Chapter 133, Oregon Laws, 1929, and Chapter 21, Oregon Laws, 1911, read in conjunction with the Act of Congress of January 19, 1929, 45 Stat. 1084, do not violate the provisions of Article I, Section 8 of the Constitution of the United States.

In re Rahrer, 140 U. S. 545.
Rhodes v. Iowa, 170 U. S. 412.
Silz v. Hesterberg, 211 U. S. 31.
Adams Express v. Kentucky, 214 U. S. 218.
Hill v. Hesterberg, 184 N. Y. 126.

II.

The effect of the bill of complaint is to invade the sovereignty of the State of Oregon in its internal affairs and to restrain in this court the enforcement of state laws, criminal in effect.

Ex parte Young, 209 U. S. 123, 159.
Georgia v. Stanton, 73 U. S. 60.

III.

No actual controversy between states is herein presented.

(a) No act or omission to act regarding any matter or thing involving property of Alabama, or denial of any valid request by Alabama, giving rise to a justifiable controversy is set forth.

Louisiana v. Texas, 176 U. S. 1, 16.

IV.

The bill of complaint presents upon its face a misjoiner of causes of action and of defendants.

(a) There are separate classes of statutes in force in the eighteen defendant states, differing in the manner of control or restriction of prison-made products. Variations among those classes of statutes are observed:

Bill—Appendix A—pp. 29-76.
Bill—Paragraph 12—p. 16.

(b) No joint action or enforcement is set forth which might possibly warrant the joinder of the defendants.

In the event that this Honorable Court shall determine to permit the bill to be filed, the State of Oregon begs leave to file an answer thereto and to present its evidence in proper manner to the end that the issues may be fairly adjudicated and speedily determined.

If this Honorable Court shall decide that the petition and bill of complaint present no cause of action on the merits, the State of Oregon prays a denial of the petition with costs.

Respectfully submitted,

I. H. VAN WINKLE,
Attorney-General,
State of Oregon.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. . . . . , Original
In Equity

STATE OF ALABAMA,
Plaintiff

v.

STATE OF ARIZONA, et al.,
Defendants

RETURN OF THE COMMONWEALTH OF PENNSYLVANIA TO THE RULE TO SHOW CAUSE WHY LEAVE SHOULD NOT BE GRANTED TO FILE BILL OF COMPLAINT, AND BRIEF IN SUPPORT THEREOF

WM. A. SCHNADER,
Attorney General.
Counsel for the Commonwealth of Pennsylvania.

STATE CAPITOL,
HARRISBURG, PA.

INDEX

	Page
Return of the Commonwealth of Pennsylvania	1
Appendix	5
A. Pennsylvania Act of April 9, 1929, P. L. 177, Sec. 2312	5
B. Pennsylvania Constitution, Art. XIV, Sec. 1	7
C. Pennsylvania Act of May 3, 1850, P. L. 654, Sec. 1	8
Brief in Support of Return	9
Statement of the Case	9
Argument	11
I. There is a Misjoinder of Parties Defendant and of Separate Causes of Action	11
II. There is No Controversy Between Alabama and Pennsylvania	12
III. The Bill Does Not Allege Violation of any Right Guaranteed to Alabama by the Constitution of the United States	13
(a) The Fourteenth Amendment Affords no Basis for the Action	13
(b) The Hawes-Cooper Act Does Not Violate the Interstate Commerce Clause of the Constitution	14
(c) The Pennsylvania Act Does Not Violate the Interstate Commerce Clause	15
(d) The Hawes-Cooper Act Does Not Violate the Tenth Amendment	16
(e) The Pennsylvania Act Imposes no Greater Restriction on Foreign Goods than on Goods Produced in Institutions of the State	16
IV. The Bill is an Attempt to Interfere with Internal Affairs of the States	17
V. Pennsylvania is Not a Proper Party Defendant	18
VI. There is No Direct Injury or Threat of Such Injury to Property Rights of Alabama	20
VII. Conclusion	21

TABLE OF CASES CITED

Page

Albright v. Board of Commissioners of Douglas County, 194 Pac. 913 (Kan.) 14
Benjamin v. Stanley Co. of America, 37 F. (2d) 904 12
Brown v. Guarantee Trust & Safe Deposit Co., 128 U. S. 403 . 12
Clark Distilling Co. v. Western Maryland Ry., Co., 242 U .S. 311 15
Gorham Mfg. Co. v. Wendell, 261 U. S. 1 19
Jacob Hoffman Brewing Co. v. McElligott, 259 Fed. 525 18
La Prade, Ex Parte, ——— U. S. ———, 77 L. ed. 860 18, 19, 20
Louisiana v. Texas, 176 U. S. 1 12
Rahrer, In Re, 140 U. S. 545 .....9, 15, 16
Rhodes v. Iowa, 170 U. S. 412 15
Scott v. Frazier, 259 Fed. 669, 253 U. S. 243 14
Wisconsin v. Pelican Insurance Co., 127 U. S. 265 13
Young, Ex Parte, 209 U. S. 123 18

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States, Amendment X 9, 16

ACTS OF CONGRESS

Act of January 19, 1929, 45 Stat. 1084, c. 79, 49 U .S. C. A. 65 (Hawes-Cooper Act) 2, 3, 14, 15, 16
Act of August 8, 1890, 26 Stat. 313, c. 728, (Wilson Act) 9, 15

PENNSYLVANIA ACTS

Act of June 23, 1931, P. L. 922, 61 PS Sec. 257 (Printed in Bill of Complaint p. 71) 3, 20
Act of April 9, 1929, P. L. 177, Sec. 2312, 71 PS Sec. 602 (Appendix, Exhibit A) 5
Act of May 3, 1850, P. L. 654, Sec. 1, 16 PS Sec. 3431 (Appendix, Exhibit C) 8, 19

CONSTITUTION OF PENNSYLVANIA, Art. XIV., Sec. 1 (Appendix, Exhibit B) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. —, Original
In Equity

STATE OF ALABAMA, *Plaintiff*

v.

STATE OF ARIZONA, et al., *Defendants*

RETURN OF THE COMMONWEALTH OF PENNSYLVANIA TO THE RULE TO SHOW CAUSE WHY LEAVE SHOULD NOT BE GRANTED TO FILE BILL OF COMPLAINT

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

The Commonwealth of Pennsylvania, one of the defendants named in the above entitled action, by William A. Schnader, its Attorney General, makes return to the rule to show cause why leave should not be granted to file the bill of complaint therein, and respectfully represents that such leave should not be granted for the following reasons:

1. It appears on the face of the bill of complaint that there is a misjoinder of parties defendant and of separate causes of action.

2. The bill of complaint does not disclose a justiciable controversy between states.

3. The bill of complaint does not allege facts which would constitute violation or threatened violation of any right guaranteed to the State of Alabama by the Constitution of the United States.

(a) The State of Alabama is not within the protection of the Fourteenth Amendment to the Constitution of the United States, and therefore cannot avail itself of any claims under the due process or equal protection clauses of that amendment.

(b) The Act of Congress of January 19, 1929, 45 Stat. 1084, c. 79, 49 U. S. C. A. 65, (Bill of Complaint, p. 77), known as the Hawes-Cooper Act, does not violate the Interstate Commerce Clause of the Constitution of the United States Art. I, Sec. 8, Cl. 3), nor does it constitute an imposition of an invalid burden upon commerce among the States. It is a proper exercise of the regulatory power of Congress over interstate commerce.

(c) The Hawes-Cooper Act does not violate

the Tenth Amendment to the Constitution of the United States.

(d) The Pennsylvania Act of June 23, 1931, P. L. 922 (61 PS Sec. 257) (Bill of Complaint, p. 71), read in conjunction with the Act of Congress of January 19, 1929, 45 Stat. 1084, c. 79 (49 U. S. C. A. 65) (Bill of Complaint, p. 77), does not violate the provisions of Art. I, Sec. 8, Cl. 3 of the Constitution of the United States.

(e) The bill of complaint does not aver that enforcement of the Pennsylvania Act of June 23, 1931, P. L. 922 (Bill of Complaint, p. 77), will impose any greater restriction on the sale in Pennsylvania of convict made goods produced in Alabama, than are imposed on the sale of convict made goods produced in institutions of the Commonwealth of Pennsylvania or of other States.

Sale of convict made goods produced in institutions of the Commonwealth of Pennsylvania is restricted to sales to governmental agencies by Section 2312 of The Administrative Code of April 9, 1929, P. L. 177 (71 PS Sec. 602). A copy of the relevant portions of that section is printed in the Appendix hereto, marked Exhibit A and made a part hereof. Practically identical restrictions are imposed by the Act of April 7, 1925, P. L. 188, as amended by the Act of May 10, 1927, P. L. 862 (61 PS Secs. 161, 162). The last mentioned act, though not expressly repealed, has

been superseded by Section 2312 of The Administrative Code, supra.

4. The bill is an attempt by Alabama to interfere with the internal affairs of a sovereign state and to induce this Court, by injunction, to restrain Pennsylvania from proceeding in its own courts to enforce its own criminal laws against persons within its borders.

5. The Commonwealth of Pennsylvania is not a proper party defendant.

(a) The action should be against the officers who would enforce the Pennsylvania legislation mentioned in the bill of complaint.

(b) Under the Constitution and laws of Pennsylvania, the Act of June 23, 1931, P. L. 922, here attacked, would not be enforced by state officers, but by district attorneys, who are county officers. Copies of Article XIV, Section 1 of the Constitution of Pennsylvania and of the relevant portion of Section 1 of the Act of May 3, 1850, P. L. 654, applicable to this point are printed in the Appendix, marked Exhibits B and C respectively, and made parts hereof.

6. The injuries to the State of Alabama, which the bill of complaint anticipates, are remote, speculative, uncertain and fanciful. There is no allegation of such direct injury to property rights as would warrant the intervention of a court of equity.

Therefore, the Commonwealth of Pennsylvania respectfully submits that leave should not be granted to the plaintiff to file the bill of complaint in this case.

COMMONWEALTH OF PENNSYLVANIA,

By

WM. A. SCHNADER,
Attorney General.

APPENDIX

Exhibit A

Pennsylvania Act of April 9, 1929, P. L. 177, Section 2312 (71 PS Sec. 602).

Section 2312. Inmate Labor.—The Department of Welfare shall have the power, and its duty shall be:

(a) To establish, maintain, and carry on industries in the Eastern State Penitentiary, the Western State Penitentiary, the Rockview Penitentiary, the new Eastern State Penitentiary at Graterford, the Pennsylvania Industrial Reformatory at Huntingdon, and such other penal or correctional institutions of this Commonwealth as it may deem proper, in which industries all persons sentenced to such institutions, who are physically capable of such labor, may be employed

at labor for not to exceed eight hours each day, other than Sundays and public holidays. Such labor shall be for the purpose of doing printing, or of manufacturing and producing supplies, or for the preparation and manufacture of building material for the construction or repair of any State institution, or in the work of such construction or repair, or for the planting of seed trees, or the performance of other work in State forests, or for the purpose of industrial training, or instruction, or in the manufacture and production of crushed stone, brick, tile and culvert pipe, or other material suitable for draining roads of the State, or in preparation of road building and ballasting material;

* * * * * * *

(c) To contract to sell or sell the articles manufactured or produced in the said industries carried on in the said penitentiaries, reformatory, or other penal or correctional institutions, which cannot be used therein, to the Commonwealth, or to any county, city, borough, township, school district, or poor district thereof, or to any State institution, or to any educational or charitable institution receiving aid from the Commonwealth, or to the Government of the United State, or any department, bureau, commission or agency thereof, or to any other State or political subdivision thereof, or to any institution receiving aid from the Government of the United States or of any other State;

(d) To arrange for the employment of inmates of such institutions, at such work or labor, within or upon the grounds of such institutions, as may

be necessary for the maintenance of the institutions or the raising of food products therefor;

* * * * * * *

(g) Through the Department of Revenue, to pay into the Manufacturing Fund the proceeds of all sales of manufactured products made under this section, and all moneys received for the labor of inmates in State forests or elsewhere than on the grounds of the institutions. This clause shall not, however, apply to the sale of surplus food products, or products of the soil as elsewhere in this act permitted;

(h) To pay, out of the Manufacturing Fund, for the machinery, equipment, and material required or used in the carrying on of the industries in the said penitentiaries, reformatory, or other institutions, under the provisions hereof, and all salaries of superintendents, managers, salesmen, clerks, and others employed in the management of the industries, and the wages, as hereinafter provided, for the labor of the inmates of said penitentiaries, reformatory, or other institutions in such industries;

* * * * * * *

Exhibit B

Constitution of Pennsylvania, Article XIV, Section 1

ARTICLE XIV

COUNTY OFFICERS

Section 1. County officers

County officers shall consist of sheriffs, coroners, prothonotaries, registers of wills, recorders of deeds, commissioners, treasurers, surveyors,

auditors or controllers, clerks of the courts, district attorneys, and such others as may from time to time be established by law; and no sheriff or treasurer shall be eligible for the term next succeeding the one for which he may be elected.

Exhibit C

Pennsylvania Act of May 3, 1850, P. L. 654, Section 1 (16 PS Sec. 3431).

* * * The officer so elected [the district attorney] shall sign all bills of indictment, and conduct in court all criminal and other prosecutions in the name of the commonwealth, or when the state is a party, which arise in the county for which he is elected, and perform all the duties which now by law are to be performed by deputy attorney generals, and receive the same fees or emoluments of office: Provided, Said district attorney shall in no case whatever have authority to enter nolle prosequi in any criminal case, either before or after bill found, or to discharge a prisoner from custody, without first having obtained the approbation of the court in writing.

BRIEF IN SUPPORT OF RETURN OF THE COMMONWEALTH OF PENNSYLVANIA

Statement

The bill improperly joins nineteen separate causes of action against nineteen different states. There was no joint action of the states in enacting the statutes under attack and there could be no joint enforcement of them.

There is no justiciable controversy between Alabama and Pennsylvania, as that term has been defined by this Court. There is no agreement between the two states which has been violated, and no effort has been made to adjust the alleged dispute between the states.

Alabama is not within the protection of the Due Process or Equal Protection clauses of the Fourteenth Amendment. Therefore, it is not in a position to raise in this proceeding any question as to the exercise of Pennsylvania's police power and its effect on the revenues of Alabama, except with respect to the Interstate Commerce Clause. But apart from that, Pennsylvania imposes no greater burden on the sale of convict made goods coming from Alabama than it does on the sale of products of its own institutions.

The Act of Congress under attack, the Hawes-Cooper Act, does not violate the Interstate Commerce Clause of the Constitution nor the Tenth Amendment. It is a complete parallel to the Wilson Act which was sustained in **In Re Rahrer,** 140 U. S. 545 (1891) and later

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No....., Original
In Equity

STATE OF ALABAMA,
Plaintiff

v.

STATE OF ARIZONA, et al.,
Defendants

RETURN OF THE COMMONWEALTH OF PENNSYLVANIA TO THE RULE TO SHOW CAUSE WHY LEAVE SHOULD NOT BE GRANTED TO FILE BILL OF COMPLAINT, AND BRIEF IN SUPPORT THEREOF

WM. A. SCHNADER,
Attorney General.
Counsel for the Commonwealth of Pennsylvania.

STATE CAPITOL,
HARRISBURG, PA.

INDEX

	Page
Return of the Commonwealth of Pennsylvania	1
Appendix	5
A. Pennsylvania Act of April 9, 1929, P. L. 177, Sec. 2312	5
B. Pennsylvania Constitution, Art. XIV, Sec. 1	7
C. Pennsylvania Act of May 3, 1850, P. L. 654, Sec. 1	8
Brief in Support of Return	9
Statement of the Case	9
Argument	11
I. There is a Misjoinder of Parties Defendant and of Separate Causes of Action	11
II. There is No Controversy Between Alabama and Pennsylvania	12
III. The Bill Does Not Allege Violation of any Right Guaranteed to Alabama by the Constitution of the United States	13
(a) The Fourteenth Amendment Affords no Basis for the Action	13
(b) The Hawes-Cooper Act Does Not Violate the Interstate Commerce Clause of the Constitution	14
(c) The Pennsylvania Act Does Not Violate the Interstate Commerce Clause	15
(d) The Hawes-Cooper Act Does Not Violate the Tenth Amendment	16
(e) The Pennsylvania Act Imposes no Greater Restriction on Foreign Goods than on Goods Produced in Institutions of the State	16
IV. The Bill is an Attempt to Interfere with Internal Affairs of the States	17
V. Pennsylvania is Not a Proper Party Defendant	18
VI. There is No Direct Injury or Threat of Such Injury to Property Rights of Alabama	20
VII. Conclusion	21

TABLE OF CASES CITED

Page

Albright v. Board of Commissioners of Douglas County, 194 Pac. 913 (Kan.) 14
Benjamin v. Stanley Co. of America, 37 F. (2d) 904 12
Brown v. Guarantee Trust & Safe Deposit Co., 128 U. S. 403 . 12
Clark Distilling Co. v. Western Maryland Ry., Co., 242 U .S. 311 15
Gorham Mfg. Co. v. Wendell, 261 U. S. 1 19
Jacob Hoffman Brewing Co. v. McElligott, 259 Fed. 525 18
La Prade, Ex Parte, ——— U. S. ———, 77 L. ed. 860 18, 19, 20
Louisiana v. Texas, 176 U. S. 1 12
Rahrer, In Re, 140 U. S. 545 .....9, 15, 16
Rhodes v. Iowa, 170 U. S. 412 15
Scott v. Frazier, 259 Fed. 669, 253 U. S. 243 14
Wisconsin v. Pelican Insurance Co., 127 U. S. 265 13
Young, Ex Parte, 209 U. S. 123 18

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States, Amendment X 9, 16

ACTS OF CONGRESS

Act of January 19, 1929, 45 Stat. 1084, c. 79, 49 U .S. C. A. 65 (Hawes-Cooper Act) 2, 3, 14, 15, 16
Act of August 8, 1890, 26 Stat. 313, c. 728, (Wilson Act) 9, 15

PENNSYLVANIA ACTS

Act of June 23, 1931, P. L. 922, 61 PS Sec. 257 (Printed in Bill of Complaint p. 71) 3, 20
Act of April 9, 1929, P. L. 177, Sec. 2312, 71 PS Sec. 602 (Appendix, Exhibit A) 5
Act of May 3, 1850, P. L. 654, Sec. 1, 16 PS Sec. 3431 (Appendix, Exhibit C) 8, 19

CONSTITUTION OF PENNSYLVANIA, Art. XIV., Sec. 1 (Appendix, Exhibit B) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. —, Original
In Equity

STATE OF ALABAMA, *Plaintiff*

v.

STATE OF ARIZONA, et al., *Defendants*

RETURN OF THE COMMONWEALTH OF PENNSYLVANIA TO THE RULE TO SHOW CAUSE WHY LEAVE SHOULD NOT BE GRANTED TO FILE BILL OF COMPLAINT

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

The Commonwealth of Pennsylvania, one of the defendants named in the above entitled action, by William A. Schnader, its Attorney General, makes return to the rule to show cause why leave should not be granted to file the bill of complaint therein, and respectfully represents that such leave should not be granted for the following reasons:

1. It appears on the face of the bill of complaint that there is a misjoinder of parties defendant and of separate causes of action.

2. The bill of complaint does not disclose a justiciable controversy between states.

3. The bill of complaint does not allege facts which would constitute violation or threatened violation of any right guaranteed to the State of Alabama by the Constitution of the United States.

(a) The State of Alabama is not within the protection of the Fourteenth Amendment to the Constitution of the United States, and therefore cannot avail itself of any claims under the due process or equal protection clauses of that amendment.

(b) The Act of Congress of January 19, 1929, 45 Stat. 1084, c. 79, 49 U. S. C. A. 65, (Bill of Complaint, p. 77), known as the Hawes-Cooper Act, does not violate the Interstate Commerce Clause of the Constitution of the United States Art. I, Sec. 8, Cl. 3), nor does it constitute an imposition of an invalid burden upon commerce among the States. It is a proper exercise of the regulatory power of Congress over interstate commerce.

(c) The Hawes-Cooper Act does not violate

the Tenth Amendment to the Constitution of the United States.

(d) The Pennsylvania Act of June 23, 1931, P. L. 922 (61 PS Sec. 257) (Bill of Complaint, p. 71), read in conjunction with the Act of Congress of January 19, 1929, 45 Stat. 1084, c. 79 (49 U. S. C. A. 65) (Bill of Complaint, p. 77), does not violate the provisions of Art. I, Sec. 8, Cl. 3 of the Constitution of the United States.

(e) The bill of complaint does not aver that enforcement of the Pennsylvania Act of June 23, 1931, P. L. 922 (Bill of Complaint, p. 77), will impose any greater restriction on the sale in Pennsylvania of convict made goods produced in Alabama, than are imposed on the sale of convict made goods produced in institutions of the Commonwealth of Pennsylvania or of other States.

Sale of convict made goods produced in institutions of the Commonwealth of Pennsylvania is restricted to sales to governmental agencies by Section 2312 of The Administrative Code of April 9, 1929, P. L. 177 (71 PS Sec. 602). A copy of the relevant portions of that section is printed in the Appendix hereto, marked Exhibit A and made a part hereof. Practically identical restrictions are imposed by the Act of April 7, 1925, P. L. 188, as amended by the Act of May 10, 1927, P. L. 862 (61 PS Secs. 161, 162). The last mentioned act, though not expressly repealed, has

been superseded by Section 2312 of The Administrative Code, supra.

4. The bill is an attempt by Alabama to interfere with the internal affairs of a sovereign state and to induce this Court, by injunction, to restrain Pennsylvania from proceeding in its own courts to enforce its own criminal laws against persons within its borders.

5. The Commonwealth of Pennsylvania is not a proper party defendant.

(a) The action should be against the officers who would enforce the Pennsylvania legislation mentioned in the bill of complaint.

(b) Under the Constitution and laws of Pennsylvania, the Act of June 23, 1931, P. L. 922, here attacked, would not be enforced by state officers, but by district attorneys, who are county officers. Copies of Article XIV, Section 1 of the Constitution of Pennsylvania and of the relevant portion of Section 1 of the Act of May 3, 1850, P. L. 654, applicable to this point are printed in the Appendix, marked Exhibits B and C respectively, and made parts hereof.

6. The injuries to the State of Alabama, which the bill of complaint anticipates, are remote, speculative, uncertain and fanciful. There is no allegation of such direct injury to property rights as would warrant the intervention of a court of equity.

Therefore, the Commonwealth of Pennsylvania respectfully submits that leave should not be granted to the plaintiff to file the bill of complaint in this case.

COMMONWEALTH OF PENNSYLVANIA,

By

WM. A. SCHNADER,
Attorney General.

APPENDIX

Exhibit A

Pennsylvania Act of April 9, 1929, P. L. 177, Section 2312 (71 PS Sec. 602).

Section 2312. Inmate Labor.—The Department of Welfare shall have the power, and its duty shall be:

(a) To establish, maintain, and carry on industries in the Eastern State Penitentiary, the Western State Penitentiary, the Rockview Penitentiary, the new Eastern State Penitentiary at Graterford, the Pennsylvania Industrial Reformatory at Huntingdon, and such other penal or correctional institutions of this Commonwealth as it may deem proper, in which industries all persons sentenced to such institutions, who are physically capable of such labor, may be employed

at labor for not to exceed eight hours each day, other than Sundays and public holidays. Such labor shall be for the purpose of doing printing, or of manufacturing and producing supplies, or for the preparation and manufacture of building material for the construction or repair of any State institution, or in the work of such construction or repair, or for the planting of seed trees, or the performance of other work in State forests, or for the purpose of industrial training, or instruction, or in the manufacture and production of crushed stone, brick, tile and culvert pipe, or other material suitable for draining roads of the State, or in preparation of road building and ballasting material;

* * * * * * * *

(c) To contract to sell or sell the articles manufactured or produced in the said industries carried on in the said penitentiaries, reformatory, or other penal or correctional institutions, which cannot be used therein, to the Commonwealth, or to any county, city, borough, township, school district, or poor district thereof, or to any State institution, or to any educational or charitable institution receiving aid from the Commonwealth, or to the Government of the United State, or any department, bureau, commission or agency thereof, or to any other State or political subdivision thereof, or to any institution receiving aid from the Government of the United States or of any other State;

(d) To arrange for the employment of inmates of such institutions, at such work or labor, within or upon the grounds of such institutions, as may

be necessary for the maintenance of the institutions or the raising of food products therefor;

* * * * * * *

(g) Through the Department of Revenue, to pay into the Manufacturing Fund the proceeds of all sales of manufactured products made under this section, and all moneys received for the labor of inmates in State forests or elsewhere than on the grounds of the institutions. This clause shall not, however, apply to the sale of surplus food products, or products of the soil as elsewhere in this act permitted;

(h) To pay, out of the Manufacturing Fund, for the machinery, equipment, and material required or used in the carrying on of the industries in the said penitentiaries, reformatory, or other institutions, under the provisions hereof, and all salaries of superintendents, managers, salesmen, clerks, and others employed in the management of the industries, and the wages, as hereinafter provided, for the labor of the inmates of said penitentiaries, reformatory, or other institutions in such industries;

* * * * * * *

Exhibit B

Constitution of Pennsylvania, Article XIV, Section 1

ARTICLE XIV

COUNTY OFFICERS

Section 1. County officers

County officers shall consist of sheriffs, coroners, prothonotaries, registers of wills, recorders of deeds, commissioners, treasurers, surveyors,

auditors or controllers, clerks of the courts, district attorneys, and such others as may from time to time be established by law; and no sheriff or treasurer shall be eligible for the term next succeeding the one for which he may be elected.

Exhibit C

Pennsylvania Act of May 3, 1850, P. L. 654, Section 1 (16 PS Sec. 3431).

* * * The officer so elected [the district attorney] shall sign all bills of indictment, and conduct in court all criminal and other prosecutions in the name of the commonwealth, or when the state is a party, which arise in the county for which he is elected, and perform all the duties which now by law are to be performed by deputy attorney generals, and receive the same fees or emoluments of office: Provided, Said district attorney shall in no case whatever have authority to enter nolle prosequi in any criminal case, either before or after bill found, or to discharge a prisoner from custody, without first having obtained the approbation of the court in writing.

BRIEF IN SUPPORT OF RETURN OF THE COMMONWEALTH OF PENNSYLVANIA

Statement

The bill improperly joins nineteen separate causes of action against nineteen different states. There was no joint action of the states in enacting the statutes under attack and there could be no joint enforcement of them.

There is no justiciable controversy between Alabama and Pennsylvania, as that term has been defined by this Court. There is no agreement between the two states which has been violated, and no effort has been made to adjust the alleged dispute between the states.

Alabama is not within the protection of the Due Process or Equal Protection clauses of the Fourteenth Amendment. Therefore, it is not in a position to raise in this proceeding any question as to the exercise of Pennsylvania's police power and its effect on the revenues of Alabama, except with respect to the Interstate Commerce Clause. But apart from that, Pennsylvania imposes no greater burden on the sale of convict made goods coming from Alabama than it does on the sale of products of its own institutions.

The Act of Congress under attack, the Hawes-Cooper Act, does not violate the Interstate Commerce Clause of the Constitution nor the Tenth Amendment. It is a complete parallel to the Wilson Act which was sustained in **In Re Rahrer**, 140 U. S. 545 (1891) and later

cases. The Pennsylvania act in question is valid because the Hawes-Cooper Act is valid.

Pennsylvania is not a proper defendant. Proceedings to enjoin enforcement of statutes alleged to be unconstitutional should be directed against the officers who would enforce them, not against the state. In Pennsylvania, criminal statutes are enforced by district attorneys who are not state, but county officers.

Finally, there is no threat of enforcement alleged. And even if there were such a threat, the bill discloses that the injuries which Alabama anticipates, are not such direct property injuries as would induce a court of equity to interfere, but are indirect, remote and speculative.

The bill is an unwarranted attempt by Alabama to interfere with the internal affairs of Pennsylvania and to prevent enforcement of Pennsylvania's criminal laws.

ARGUMENT

I.

There is a Misjoinder of Parties Defendant and of Separate Causes of Action

This bill of complaint joins as defendants nineteen states. It seeks to enjoin each one of the defendants from enforcing its particular statute dealing with the sale of convict made goods.

Each one of these statutes is an act adopted by a single state independently of any action by the others. Each act is effective only within the territory of the state which adopted it, and can be enforced only by the proper authorities within that state against persons within the jurisdiction of the courts of the state. It is obvious that there was no joint action of the various defendants in enacting these laws, and there could not possibly be any joint action in their enforcement. It follows that there could not properly be a single decree against all the defendants; nineteen separate injunctions would be necessary, each against a single defendant.

Moreover, it is apparent on the face of the bill that there is no uniformity among the state acts attacked. Paragraph 12 of the bill (p. 16) shows that the various acts fall into two distinct classes, one limiting sales directly, and the other simply requiring that convict made goods be labelled in certain prescribed ways. Within these general classes there are wide variations

in the details of the various enactments. It would be extremely cumbersome, if not practically impossible, to adjudicate the validity of all these acts in a single proceeding.

Therefore, we respectfully submit that there is no proper ground for uniting the complaints of the State of Alabama against the nineteen defendants under Equity Rule No. 26: **Brown v. Guarantee Trust and Safe Deposit Co.**, 128 U. S. 403, 410, 411, 412 (1888); **Benjamin v. Stanley Co. of America**, 37 F. (2d) 904, 905 (1930).

II.

There is No Controversy Between Alabama and Pennsylvania

It is well settled that the Supreme Court of the United States will take original jurisdiction in cases between states only if justiciable controversies are involved.

The bill of complaint does not allege either that any agreement between the State of Alabama and the Commonwealth of Pennsylvania has been violated or that any effort to adjust the differences between the two states has been made. Therefore the bill discloses no justiciable controversy between states.

In **Louisiana v. Texas**, 176 U. S. 1 (1900), this Court said (pages 18 and 22):

> "In the absence of agreement it may be that a controversy might arise between two states for

the determination of which the original jurisdiction of this court could be invoked, but there must be a direct issue between them, and the subject-matter must be susceptible of judicial solution. And it is difficult to conceive of a direct issue between two states in respect of a matter where no effort at accommodation has been made; nor can it be conceded that it is within the judicial function to inquire into the motives of a state legislature in passing a law, or of the chief magistrate of a state in enforcing it in the exercise of his discretion and judgment. Public policy forbids the imputation to authorized official action of any other than legitimate motives.

"* * * When there is no agreement whose breach might create it, a controversy between states does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one state to a distinct collision with a sister state."

See also **Wisconsin v. Pelican Insurance Company of New Orleans**, 127 U. S. 265, 288 (1888).

III.

The Bill Does Not Allege Violation of any Right Guaranteed to Alabama by the Constitution of the United States

(a) The Fourteenth Amendment Affords no Basis for the Action

The bill of complaint which Alabama seeks to file

nowhere directly alleges that the statutes attacked violate the Fourteenth Amendment to the Constitution of the United States. However, the allegations indicate that Alabama bases its claims in part at least on contentions that enforcement of the state statutes in question would deprive it of property without due process of law and of the equal protection of the laws.

The Fourteenth Amendment "protects persons only, a term which embraces private corporations, but not public corporations or states": **Scott v. Frazier,** 259 Fed. 669, 671 (1919), decided on another point in 253 U. S. 243 (1920). To the same effect is **Albright v. Board of Commissioners of Douglas County,** 194 Pac. 913, 915 (Kan. 1921).

Therefore, this plaintiff cannot maintain a bill based on the complaint that it is being deprived of its property without due process of law or of the equal protection of the laws.

(b) The Hawes-Cooper Act Does Not Violate the Interstate Commerce Clause of the Constitution

The Act of Congress of January 19, 1929, 45 Stat. 1084, c 79 (49 U. S. C. A. 65; Bill of Complaint p. 77), commonly known as the Hawes-Cooper Act, is attacked as violating the Interstate Commerce Clause (Art. I, Sec. 8, Clause 3) of the Constitution of the United States.

The Hawes-Cooper Act is a complete parallel to the

Act of Congress of August 8, 1890, 26 Stat. 313, c. 728, commonly known as the Wilson Act. The Wilson Act left the states free to deal with intoxicating liquors in precisely the same way that the Hawes-Cooper Act leaves the states free to deal with convict made goods.

In **In Re Rahrer,** 140 U. S. 545 (1891), every possible objection was raised against the Wilson Act which could be raised against the Hawes-Cooper Act. These objections were considered at length in the opinion of this Court and they were all resolved in favor of the validity of the act. Later cases have followed the **Rahrer Case** and have reiterated the constitutionality of the Wilson Act. **Rhodes v. Iowa,** 170 U. S. 412, 417, 420 (1893); **Clark Distilling Company v. Western Maryland Railway Company,** 242 U. S. 311, 323, 326, 330 (1917), and cases therein cited.

(c) The Pennsylvania Act Does Not Violate the Interstate Commerce Clause

The Pennsylvania Act of June 23, 1931, P. L. 922, (61 PS Sec. 257; Bill of Complaint p. 71), is undoubtedly dependent for its validity on the existence of the Hawes-Cooper Act. The state act does not become effective until the effective date of the Act of Congress (See Bill of Complaint, pp. 72 and 78). If the Hawes-Cooper Act is constitutional, the Pennsylvania act is clearly valid. Enforcement of the state act then becomes a simple exercise by Pennsylvania of its police power, freed from restrictions of the Interstate Commerce Clause of the Federal Constitution.

If it be objected that sales of convict made goods may not be regulated under the police power of the state to the same extent as sales of intoxicating liquor, the answer is that that question cannot properly be brought before the court in this case. Limitations on the police power of the state, with respect to private property, are imposed by the state constitutions and by the Fourteenth Amendment to the Federal Constitution. The State of Alabama has no rights under the Constitution of Pennsylvania nor, as we have demonstrated, under the Fourteenth Amendment. Consequently, the plaintiff cannot question the police power of the Commonwealth of Pennsylvania within its borders, as long as the Interstate Commerce Clause is not violated.

(d) The Hawes-Cooper Act Does Not Violate the Tenth Amendment

The Bill of Complaint (page 10) alleges that the Hawes-Cooper Act violates the Tenth Amendment to the Constitution of the United States. The opinion of this Court in the **Rahrer Case** demonstrates, if demonstration be necessary, that the Hawes-Cooper Act, like the Wilson Act, does not violate the Tenth Amendment, but gives direct effect to it.

(e) The Pennsylvania Act Imposes No Greater Restriction on Foreign Goods than on Goods Produced in Institutions of the State

The Pennsylvania act simply forbids the sale in open market of convict made goods produced in

other states. Other legislation which we have quoted in the Appendix to our return (Exhibit A) imposes the same restrictions on the sale of goods produced in Pennsylvania penal institutions. However, even if there were heavier restrictions on the sale of foreign goods than on domestic goods, that would be basis for complaint of violation of the Equal Protection Clause of the Fourteenth Amendment. As we have pointed out, the State of Alabama may not invoke the protection of that portion of the Constitution.

IV.

The Bill Is an Attempt to Interfere With Internal Affairs of the States

Alabama seeks to enforce on the defendant states its will that convict made goods shall be sold everywhere in competition with similar goods made by free workmen. One state has no rights of property within another state unless created by the Constitution of the United States. As we have pointed out, the Fourteenth Amendment affords no such rights. Nor does any other portion of the Constitution. Therefore, we submit that this Court should not lend its aid to such an attempt by Alabama to subject other states to its demands.

Moreover, the bill is an effort to have this Court enjoin the enforcement of criminal laws of the defendant states. It is a well settled principle that, subject to exceptions not here present, equity will not interfere with enforcement of the criminal laws, but will

leave the parties to their legal remedies in defending against criminal prosecutions: **Ex Parte Young, 209 U. S. 123, 161 (1908); Jacob Hoffman Brewing Company v. McElligott, 259 Fed. 525, 529, 533 (1919).**

V.

Pennsylvania is Not a Proper Party Defendant

Examination of the cases in which injunctions have been sought against the enforcement of unconstitutional statutes reveals that almost without exception the proceedings have been instituted against the officers who would enforce the statutes. And that is the proper course to pursue. Such actions are entirely personal in their nature; they enjoin the individual not the incumbent of an office. As was pointed out in **Ex Parte Young, 209 U. S. 123, 159 (1908)**, the act of an official in attempting to enforce an unconstitutional statute:

> "* * * is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. * * *"

The above statement was repeated and approved in **Ex Parte La Prade, — U. S. ——, 77 L. ed. 860, 863 (1933).**

So personal is a proceeding against an officer to en-

join enforcement of an unconstitutional statute that, without statutory authority to the contrary, the action abates if the particular officer ceases to occupy the office while the suit is pending. It is not the office but the individual who is enjoined: **Ex Parte La Prade**, — U. S. —, 77 L. ed. 860, 863 (1933); **Gorham Manufacturing Company v. Wendell, 261 U. S. 1 (1923)**. It is our position that a proceeding of this kind must be instituted against the individual officer who would enforce it, and not against the state itself.

This principle is particularly appropriate to the present case because, under the Constitution and laws of Pennsylvania, state officers would not enforce the statute in question. Enforcement of the act would be by prosecution in the criminal courts. By the Pennsylvania Act of May 3, 1850, P. L. 654, Sec. 1, (16 PS Sec. 3431; Appendix, Exhibit C), the conduct of all prosecutions devolves upon the district attorney; and under Article XIV, Section 1 of the Pennsylvania Constitution, (Appendix, Exhibit B) district attorneys are county officers.

Consequently, even if the court should issue an injunction against the Commonwealth of Pennsylvania, and if the injunction should be construed to be binding on the present state officers, it would not reach the officials who would have charge of direct enforcement of the act in question, namely, district attorneys, who are county officers.

VI.

There is No Direct Injury or Threat of Such Injury to Property Rights of Alabama

The bill of complaint does not allege that the Commonwealth of Pennsylvania or any officer within the Commonwealth has threatened to enforce the provisions of the Act of June 23, 1931, P. L. 922. In **Ex Parte La Prade**, — U. S. —, 77 L. ed. 860, 863 (1933), this Court said of a proceeding to enjoin enforcement of an allegedly unconstitutional statute (p. 864):

> "* * * Plaintiffs did not allege that petitioner threatened or intended to do anything for the enforcement of the statute. The mere declaration of the statute that suits for recovery of penalties shall be brought by the attorney general is not sufficient. Petitioner might hold, as plaintiffs maintain, that the statute is unconstitutional and that, having regard to his official oath, he rightly may refrain from effort to enforce it. * * *"

Moreover, it is apparent from the reading of the bill that the injuries which the plaintiff anticipates are remote and speculative. Enforcement of the law of Pennsylvania will not have any direct effect on the State of Alabama. It will operate directly only on the individual who attempts to sell convict made goods in the open markets of Pennsylvania. Alabama will be affected only indirectly, if at all. We submit that such a case does not warrant the intervention of a court of equity.

VII.

Conclusion

For the reasons we have stated, we respectfully submit that the motion for leave to file the bill of complaint should be denied.

WM. A. SCHNADER,
Attorney General.
Counsel for the Commonwealth
of Pennsylvania.

FILE COPY

No..... ORIGINAL.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1932.

STATE OF ALABAMA, *Plaintiff,*

v.

STATE OF WASHINGTON, *et al.,* *Defendant.*

IN EQUITY

RETURN SUBMITTED ON BEHALF OF THE STATE OF WASHINGTON ON APPLICATION OF STATE OF ALABAMA FOR PERMISSION TO FILE BILL OF COMPLAINT.

G. W. HAMILTON,
Attorney General,

JOHN W. HANNA,
Assistant Attorney General,

E. P. DONNELLY,
Assistant Attorney General,

Attorneys for Defendant, State of Washington.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

STATE PRINTING PLANT, OLYMPIA, WASH.

No..... ORIGINAL.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1932.

STATE OF ALABAMA,	*Plaintiff*,	IN EQUITY
v.		
STATE OF WASHINGTON, *et al.*,	*Defendant.*	

RETURN SUBMITTED ON BEHALF OF THE STATE OF WASHINGTON ON APPLICATION OF STATE OF ALABAMA FOR PERMISSION TO FILE BILL OF COMPLAINT.

G. W. HAMILTON,
Attorney General,

JOHN W. HANNA,
Assistant Attorney General,

E. P. DONNELLY,
Assistant Attorney General,

Attorneys for Defendant, State of Washington.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

INDEX

	Page
Cases cited	4
General Statement	5
Specific objections	6-7
No constitutional rights of plaintiff violated	7
Hawes-Cooper Act is proper exercise of the regulatory power of Congress over interstate commerce	6
Chapter 294, Session Laws of 1927 of State of Washington, constitutes a lawful exercise of police power	7
The bill of complaint presents upon its face a misjoinder of parties defendant and of causes of action	8
Affidavit of service by mail	10

AUTHORITIES CITED

	Page
Adams Express v. Kentucky, 214 U. S. 218	7
Albright v. Board of Commissioners, 194 Pac. 913 (1921)	6
Clark Distilling Co. v. Western Md. R. R. Co., 242 U. S. 311 (1917)	7
Ex Parte Young, 209 U. S. 123, 159	7
Georgia v. Stanton, 73 U. S. 60	7
Hipolite Egg Co. v. U. S., 220 U. S. 45	7
Hill v. Hesterberg, 184 N. Y. 126	7
In re Rahrer, 140 U. S. 545 (1891)	6-7
Louisiana v. Texas, 176 U. S. 1-16	8
Rhodes v. Iowa, 170 U. S. 412, 420 (1898)	6-7
Scott v. Frazier, 258 Fed. 669, 671	6
Silz v. Nesterberg, 211 U. S. 31 (1908)	7

No..... ORIGINAL.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1932.

STATE OF ALABAMA, *Plaintiff*,

v.

STATE OF WASHINGTON, *et al.*, *Defendant*.

IN EQUITY

RETURN SUBMITTED ON BEHALF OF THE STATE OF WASHINGTON ON APPLICATION OF STATE OF ALABAMA FOR PERMISSION TO FILE BILL OF COMPLAINT.

And now comes the State of Washington and in return to the show cause order issued by the above entitled court under date of the 15th day of May, A. D. 1933, why leave to file the bill of complaint herein against the said State of Washington should not be granted says:

The State of Washington does not object to a determination upon the merits of the controversy sought to be adjudicated by the petition herein, nor

does the State of Washington desire to interpose needless obstacles to such result. There are, however, considerations of consequence which weigh heavily against the granting of the petition herein and against a determination of the issues on the basis of the complaint herein. Briefly stated, these considerations are:

I. No constitutional right guaranteed to Alabama by the Constitution of the United States is violated or threatened with violation by the acts alleged in the bill of complaint sought to be filed.

(a) The Fourteenth Amendment to the Constitution of the United States does not encompass the State of Alabama as such within its protection, and the due process or equal protection clauses thereof may not be availed of by the State of Alabama.

Scott v. Frazier, 258 Fed. 669, 671. (Decided, 1920, on another point in 253 U. S. 243.)

Albright v. Bd. of Comm'rs, 194 Pac. 913 (1921) Kansas.

(b) The Act of Congress of Jan. 19, 1919, 45 Stat. 1084 (Complaint, p. 77), known as the Haws-Cooper Act, does not violate the interstate commerce clause of the Constitution of the United States (Art. 1, Sec. 8, Cl. 3), nor does it constitute an imposition of an invalid burden upon commerce among the states. It is a proper exercise of the regulatory power of Congress over interstate commerce.

In re Rahrer, 140 U. S. 545 (1891);

Rhodes v. Iowa, 170 U. S. 412, 420 (1898);

Clark Distilling Co. v. Western Md. R. R. Co., 242 U. S. 311 (1917);
Silz v. Hesterberg, 211 U. S. 31 (1908);
Hipolite Egg Co. v. U. S., 220 U. S. 45.

(c) The provisions of Chapter 294, Session Laws of 1927 of the State of Washington, constitute but a lawful exercise of the police power of the sovereign State of Washington reposed and vested in it by the Constitution of the United States.

(d) Chapter 294, Session Laws of 1927, of the State of Washington, read in connection with the Act of Congress of January 19, 1929, 45 Stat. 1084, does not violate the provisions of Art. 1, sec. 8 of the Constitution of the United States.

In re Rahrer, 140 U. S. 545;
Rhodes v. Iowa, 170 U. S. 412;
Silz v. Hesterberg, 211 U. S. 31;
Adams Express v. Kentucky, 214 U. S. 218;
Hill v. Hesterberg, 184 N. Y. 126.

II. The effect of the bill of complaint is to invade the sovereignty of the State of Washington in its internal affairs and to restrain in state courts the enforcement of state laws, criminal in effect.

Ex parte Young, 209 U. S. 123, 159;
Georgia v. Stanton, 73 U. S. 60.

III. No actual controversy between states is herein presented.

(a) No act or omission to act regarding any matter or thing involving property of Alabama, or

denial of any valid request by Alabama, giving rise to a justiciable controversy is set forth.

Louisiana v. Texas, 176 U. S. 1-16.

IV. The bill of complaint presents upon its face a misjoinder of causes of action and of defendants.

(a) There are separate classes of statutes in force in the eighteen defendant states, differing in the manner of control or restriction of prison-made products. Variations among those classes of statutes are observed.

Bill—Appendix A—pp. 29-76;
Bill—Paragraph 12—p. 16.

(b) No joint action or enforcement is set forth which might possibly warrant the joinder of the defendants.

V. There is now pending in the New York State Supreme Court, Albany County, an action in equity, entitled "Harry Greenthal v. John J. Bennett Jr., as Attorney-General of the State of New York," which seeks to restrain the enforcement of both Ch. 26, L. 1933 of New York and the Act of Congress of Jan. 19, 1929 (Hawes-Cooper Act), 45 Stat. 1084 on the ground that both represent unconstitutional interferences with interstate commerce.

(a) This said case presents a real controversy, identical in effect with the bill of complaint herein, and which will probably be carried on appeal or writ of certiorari to this Court. Argument has been heard at Special Term, and decision is being awaited.

(b) The several states defendant in the instant petition may be heard to join by submission of Amicus Curiae briefs in said action, or may await individual test in proper manner.

The State of Washington, in submitting this memorandum, does not desire to be understood as opposing a hearing upon the merits of the controversy sought to be presented by the petition and bill of complaint of Alabama herein. In the event that this Honorable Court shall determine to permit the bill to be filed, Washington begs leave to file an answer thereto and to present its evidence in proper manner to the end that the issues may be fairly adjudicated and speedily determined.

If this Honorable Court shall decide that the petition and bill of complaint present no cause of action on the merits, Washington State prays a denial of the petition with costs.

Respectfully submitted,

G. W. HAMILTON,
Attorney General,

JOHN W. HANNA,
Assistant Attorney General,

E. P. DONNELLY,
Assistant Attorney General,

Attorneys for Defendant,
State of Washington.

AFFIDAVIT OF SERVICE BY MAIL.

STATE OF WASHINGTON,
County of Thurston. } ss.

June Champie being first duly sworn, on oath says:

That she is now and at all times herein mentioned was a citizen of the United States and of the State of Washington, and over the age of twenty-one years. That on the *28th* day of September, A. D. 1933, she deposited in the United States postoffice in the City of Olympia, State of Washington, in a sealed envelope plainly addressed to Thomas E. Knight, Jr., attorney general of the State of Alabama and attorney of record for plaintiff, with postage thereon fully prepaid, by registered mail, a true and correct printed copy of the foregoing return submitted on behalf of the State of Washington on application of the State of Alabama for permission to file bill of complaint.

JUNE CHAMPIE

Subscribed and sworn to before me this 28th day of September, A. D. 1933.

GEORGE DOWNER,
Notary Public in and for the State of Washington, residing at ~~Olympia~~ Bellingham

(SEAL)

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. Original

STATE OF ALABAMA,
Complainant,

v.

STATE OF ARIZONA, ET AL.,
Respondents.

IN EQUITY.

BRIEF OF THE COMPLAINANT ON THE RULE TO SHOW CAUSE WHY THE BILL SHOULD NOT BE FILED AND ON THE RETURNS THERETO

PERRY W. TURNER,
WM. LOGAN MARTIN,
Counsel

THOMAS E. KNIGHT, JR.,
Attorney General

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. Original

STATE OF ALABAMA,
Complainant,

v.

STATE OF ARIZONA, ET AL.,
Respondents.

IN EQUITY.

BRIEF OF THE COMPLAINANT ON THE RULE TO SHOW CAUSE WHY THE BILL SHOULD NOT BE FILED AND ON THE RETURNS THERETO

PERRY W. TURNER,
WM. LOGAN MARTIN,
Counsel

THOMAS E. KNIGHT, JR.,
Attorney General

SUBJECT INDEX

Page

Statement of the Case 1

Summary of Argument 2

Argument 6

The Complainant may Join all Defendants in One Suit 6

Early Provisions for Controversies Among More Than Two States 18

(a) Articles of Confederation 18

(b) Convention of 1787 15

Complainant's Rights as Sovereign and Proprietor 19

The Controversy is Justiciable 25

Congress Lacks the Power to Enact the Hawes-Cooper Act 26

The Wilson Act 39

Has Congress the Power to Grant Permission to a State to Bar all Commerce? 44

The Power to Regulate 49

Meaning and Use of "Regulate" Among the Colonies 51

Commerce under the Confederation 71

The Convention of 1787—Development of the Commerce Clause 80

Views Expressed in the Convention—Public Writings—The Federalist 85

Congress Cannot Delegate its Powers 102

The States Cannot Divide an Interstate Jour-

Page

ney into Segments 108
The Report of the Senate Committee 128
Conclusion 128

Affidavit of Service by Mailing 131

Appendix—
Hawes-Cooper Act 132
Webb-Kenyon Act 133
Child Labor Act 133
Child Labor Tax Act 138
Wilson Act 143

TABLE OF CASES

Case *Page*

Allinson, Hale v., 188 U. S. 56 (47 L. ed. 380) 2, 6, 9

Anderson, Florida v., 91 U. S. 684 (23 L. ed. 290) 23

Bailey v. Drexel Furniture Co., 259 U. S. 20 (66 L. ed. 817) 3, 33

Bitterman v. L. & N. R. R. Co., 207 U. S. 205 (52 L. ed. 171) 2, 7

Board of Wardens, Cooley v., 12 How. 299 (13 L. ed. 996) 50

Bowman v. Chicago and Northwestern Ry. Co., 125 U. S. 524 (31 L. ed. 700) 5, 108, 112

Brooks v. United States, 267 U. S. 432 (69 L. ed. 699) 4, 38

Brown v. Maryland, 12 Wheat. 419 (6 L. ed. 678) 5, 27, 108, 109

Caminetti v. United States, 242 U. S. 470 (61 L. ed. 442) 4, 29

Chicago and Northwestern Ry. Co., Bowman v., 125 U. S. 524 (31 L. ed. 700) 5, 108, 112

Case *Page*

Child Labor Case (Hammer v. Dagenhart), 247 U. S. 251 (62 L. ed. 1101) 3, 28, 30, 35

Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311 (61 L. ed. 326) 4, 26, 27, 29

Colorado, Kansas v., 185 U. S. 125 (46 L. ed. 838) 10

Connecticut v. Massachusetts, 282 U. S. 660 (75 L. ed. 602) 9

Cooley v. Board of Wardens, 12 How. 299 (13 L. ed. 996) 4, 30

Dagenhart, Hammer v., (Child Labor Case), 247 U. S. 251 (62 L. ed. 1101) 3, 28, 30, 35

Deering, Duplex Printing Press Co. v., 254 U. S. 443 (65 L. ed. 349) 3, 123

Drexel Furniture Co., Bailey v., 259 U. S. 20 (66 L. ed. 817) 3, 35

Duplex Printing Press Co. v. Deering, 254 U. S. 443 (65 L. ed. 349) 6, 123

Employers' Liability Cases, 207 U. S. 463 (52 L. ed. 297) 118

Case Page

Farmers' Loan and Trust Company, Pollock v., 157 U. S. 429 (39 L. ed. 759) 101

Federal Trade Commission v. Raladam Co., 283 U. S. 643 (75 L. ed. 1324) 128

Florida v. Anderson, 91 U. S. 667 (23 L. ed. 390) 23

Florida v. Mellon, 273 U. S. 12 (71 L. ed. 511) 23

Gibbons v. Ogden, 9 Wheat. 1 (6 L. ed. 23) 4, 5, 49, 185

Groves v. Slaughter, 15 Pet. 449 (10 L. ed. 800) 4, 48

Hale v. Allinson, 188 U. S. 56 (47 L. ed. 386) 2, 6, 9

Hammer v. Dagenhart (Child Labor Case), 247 U. S. 251 (62 L. ed. 1101) 3, 28, 30, 35

Hipolite Egg Company v. United States, 220 U. S. 45 (55 L. ed. 364) 4, 29

Hoke v. United States, 227 U. S. 308 (57 L. ed. 523) 4, 29

Illinois, Missouri v., 180 U. S. 208 (45 L. ed. 497) 3, 12, 19

Case *Page*

Illinois, Wabash, St. Louis & Pacific Ry. Co. v., 118 U. S. 557 (30 L. ed. 244) 121

Illinois, Wisconsin v., 278 U. S. 367 (73 L. ed. 426) 2, 11

Kansas v. Colorado, 185 U. S. 125 (46 L. ed. 838) 10

Kansas Natural Gas Company, West v., 221 U. S. 229 (55 L. ed. 716) 4, 47

Kidd v. Pearson, 128 U. S. 1 (32 L. ed. 346) 119

Kimball, Mobile v., 102 U. S. 691 (26 L. ed. 238) 118

Knight Company, United States v., 156 U. S. 1 (39 L. ed. 325) 116

Lehigh Valley R. R. Co. v. Pennsylvania, 145 U. S. 192 (36 L. ed. 672) 100

License Cases, 5 How. 504 (12 L. ed. 256) 40

Lottery Cases, 188 U. S. 321 (47 L. ed. 492) 4, 29

L. & N. R. R. Co., Bitterman v., 207 U. S. 205 (52 L. ed. 171) 2, 7

Maryland, Brown v., 12 Wheat. 419 (6 L. ed. 678) 5, 27, 108, 109

Case Page
Maryland, McCulloch v., 4 Wheat. 316 (4 L. ed. 579) 107

Maryland, Ward v., 12 Wall. 418 (20 L. ed. 449) 115

Massachusetts, Connecticut v., 282 U. S. 660 (75 L. ed. 602) 9

Massachusetts v. Mellon, 262 U. S. 447 (67 L. ed. 1078) 24

Massachusetts, Rhode Island v., 12 Pet. 657 (9 L. ed. 1233) 12, 13

Massachusetts, Rhode Island v., 14 Pet. 210 (10 L. ed. 423) 2, 8, 11

Mayor v. Miln, 11 Pet. 102 (9 L. ed. 648) 24

McCulloch v. Md., 4 Wheat. 316 (4 L. ed. 579) 107

Mellon, Florida v., 273 U. S. 12 (71 L. ed. 511) 23

Mellon, Massachusetts v., 262 U. S. 447 (67 L. ed. 1078) 24

Miln, Mayor v., 11 Pet. 102 (9 L. ed. 648) 24

Minnesota Rate Cases, 230 U. S. 352 (57 L. ed. 1511) 101

Case *Page*

Missouri v. Illinois, 180 U. S. 208 (45 L. ed. 497) 8, 12, 19

Mobile v. Kimball, 102 U. S. 691 (26 L. ed. 238) 118

Ogden, Gibbons v., 9 Wheat. 1 (6 L. ed. 23) 4, 5, 46, 105

Ohio v. West Virginia, 252 U. S. 563 (64 L. ed. 717) 2, 9

Pearson, Kidd v., 128 U. S. 1 (32 L. ed. 346) 119

Pennsylvania, Lehigh Valley R. R. Co. v., 145 U. S. 192 (36 L. ed. 672) 100

Pennsylvania v. West Virginia, 252 U. S. 563 (64 L. ed. 717) 2, 9

Pennsylvania v. West Virginia, 262 U. S. 553 (67 L. ed. 1117) 26

Pennsylvania v. Wheeling and Belmont Bridge Co., 9 How. 647 (13 L. ed. 294) 8, 21

Pollock v. Farmers' Loan and Trust Company, 157 U. S. 429 (39 L. ed. 759) 101

Rahrer, In re, 140 U. S. 545 (35 L. ed. 372) 4, 5, 46, 105

Case	Page
Raladam Co., Federal Trade Commission v., 283 U. S. 643 (75 L. ed. 1324)	123
Rhode Island v. Massachusetts, 12 Pet. 657 (9 L. ed. 1233)	12, 13
Rhode Island v. Massachusetts, 14 Pet. 210 (10 L. ed. 423)	2, 11
Robbins v. Taxing District, 120 U. S. 489 (30 L. ed. 694)	5, 108, 110
St. Paul, Minneapolis & Manitoba Ry. Co. et al., United States v., 247 U. S. 310 (62 L. ed. 1130)	6, 123
Sandford, Scott v., 19 How. 393 (15 L. ed. 691)	100
Scott v. Sandford, 19 How. 393 (15 L. ed. 691)	100
Second Employers' Liability Cases, 223 U. S. 1 (56 L. ed. 327)	51
Slaughter, Groves v., 15 Pet. 449 (10 L. ed. 800)	4, 48
South Carolina v. United States, 199 U. S. 437 (50 L. ed. 261)	106
State Freight Tax, 15 Wall. 232 (21 L. ed. 146)	115

Case *Page*

Taxing District, Robbins v., 120 U. S. 489 (30 L. ed. 694) 5, 108, 110

Texas v. White, 7 Wall. 700 (19 L. ed. 227) 23

United States, Brooks v., 267 U. S. 432 (69 L. ed. 699) 4, 38

United States, Caminetti v., 242 U. S. 470 (61 L. ed. 442) 4, 29

United States, Hipolite Egg Co. v., 220 U. S. 45 (55 L. ed. 364) 4, 29

United States, Hoke v., 227 U. S. 308 (57 L. ed. 523) 4, 29

United States v. Knight Company, 156 U. S. 1 (39 L. ed. 325) 116

United States v. St. Paul, Minneapolis & Manitoba Ry. Co. et al., 247 U. S. 310 (62 L. ed. 1130) 6, 128

United States, South Carolina v., 199 U. S. 437 (50 L. ed. 261) 106

Wabash, St. Louis & Pacific Ry. Co. v. Illinois, 118 U. S. 557 (30 L. ed. 244) 121

Case *Page*

Ward v. Maryland, 12 Wall. 418 (20 L. ed. 449) 115

West v. Kansas Natural Gas Company, 221 U. S. 229 (55 L. ed. 716) 4, 47

West Virginia, Ohio v., 252 U. S. 563 (64 L. ed. 717) 2, 9

West Virginia, Pennsylvania v., 252 U. S. 563 (64 L. ed. 717) 2, 9

West Virginia, Pennsylvania v., 262 U. S. 553 (67 L. ed. 1117) 3, 26

Western Maryland Ry. Co., Clark Distilling Co. v., 242 U. S. 311 (61 L. ed. 326) 4, 26, 27, 29

Wheeling and Belmont Bridge Co., Pennsylvania v., 9 How. 647 (13 L. ed. 294) 3, 21

White, Texas v., 7 Wall. 700 (19 L. ed. 227) 28

Wisconsin v. Illinois, 278 U. S. 367 (73 L. ed. 426) 2, 11

CONSTITUTION, ARTICLES OF CONFEDERATION, JOURNALS OF THE CONTINENTAL CONGRESS, STATUTES, HISTORICAL WRITINGS, ETC.

Page

Constitution of the United States—
- Article I, Sec. 1 104
- Article I, Sec. 8, Cl. 3 80
- Article II, Sec. 2 46
- Article III, Sec. 2 ..... 1, 3
- Article IV, Sec. 3 46
- 10th Amendment 1

Articles of Confederation—
- Article IV 5, 46, 71, 102
- Article VI 72
- Aritcle IX 3, 13, 14
- Article IX, Sec. 1 73
- Article IX, Sec. 2 14
- Article XVIII 13

Journals of the Continental Congress (sometimes abbreviated at J. C. C.)—
- Vol. V. 14, 72
- Vol. IX 14, 73
- Vol. XI 74
- Vol. XIV 15
- Vol. XV 15
- Vol. XIX 75
- Vol. XXI 15, 78

Page

Vol. XXV 76, 77
Vol. XXVI 15
Vol. XXVII 15
Vol. XXVIII 15, 79

United States Statutes—
Hawes-Cooper Act
(45 Stat. at L. 1084) 1, 3, 6, 9, 26, 34, 35, 39, 40, 43, 44, 47, 108, 128, 132
Senate Committee Report No. 844, 70th Congress, 2nd Session 654-5 128
Webb-Kenyon Act
(37 Stat. at L. 699) 26, 39, 133
Child Labor Act
(39 Stat. at L. 675) 35, 133
Child Labor Tax Act
(40 Stat. at L. 1057, 1138) 133
Wilson Act
(26 Stat. at L. 313) 42, 43, 143
Historical Writings, Etc.—
Curtis' Constitutional History of the United States (1889), Vol. 1 75
Elliot's Debates—
Vol. 1 ..... 88, 89, 90
Vol. 2 ..... 90, 91, 92, 93
Vol. 3 ..... 93, 94, 95, 109
Vol. 4 95
Farrand—The Records of the Federal Convention—
Vol. 1 ..... 15, 16, 80, 81, 82, 83

Page

Vol. 2 ..... 16, 17, 18, 19, 83, 84, 85

House Document 398, 69th Congress (sometimes referred to as H. D. 398) 61, 62, 70, 71, 79, 85, 86, 87, 91, 92

The Federalist—

Vol. 1 96-99

STATEMENT OF THE CASE

This is an original bill filed under Article III, Section 2 of the Constitution. The complainant operates two cotton mills, a shirt factory and farms, employing the labor of its prisoners. It sells its products in interstate commerce by contract and on the market. Its average income for its labor and material from the products of its mills and factory from goods sold in the defendant states is in excess of $100,000 per annum. Likewise it markets in the defendant states products from its farms.

The bill seeks to enjoin the enforcement of certain laws of the defendant states, set out in the appendix of the bill, which restrict the sale of the complainant's products by requiring the same to be labeled or branded or forbid their sale entirely. The complainant seeks also to have declared invalid the Hawes-Cooper Act of Congress which undertakes to divest of their interstate character the products of complainant's mills and farms upon arrival and delivery in a state in which laws have been passed restricting or forbidding the sale of such products.

The bill is based on the violation of the sovereign and proprietary rights of the complainant. It avers that the laws of which complaint is made violate the interstate commerce clause and the 10th Amendment of the Constitution.

SUMMARY OF ARGUMENT

The complainant may join all defendants in one suit.

William E. Hale, etc. v. Edward P. Allinson et al., 188 U. S. 56 (47 L. ed. 380);
Marcus K. Bitterman et al. v. Louisville & Nashville Railroad Company, 207 U. S. 205 (52 L. ed. 171).

The court will adopt the most liberal principles of practice and pleading in order to enable both parties to present their respective claims in their full strength.

Rhode Island v. Massachusetts, 14 Pet. 210 (10 L. ed. 423).

Other cases of original jurisdiction involving the same principles have been consolidated.

Pennsylvania v. West Virginia and *Ohio v. West Virginia*, 252 U. S. 568 (64 L. ed. 717).

In a prior case four states were parties plaintiff.

Wisconsin et al. v. Illinois et al., 278 U. S. 367 (73 L. ed. 426).

The court will mould the rules of chancery practice and pleading in such a manner as to bring a case (relating to boundaries) to a final hearing on its real merits.

Rhode Island v. Massachusetts, supra.

The Articles of Confederation provided for controversies among more than two states.

Articles of Confederation, Article IX.

The Convention of 1787 assumed that such controversies would arise.

Constitution, Article III, Sec. 2.

The complainant sues to enforce its rights as sovereign and proprietor.

Missouri v. Illinois, 180 U. S. 208 (45 L. ed. 497);
Pennsylvania v. The Wheeling and Belmont Bridge Company, 9 How. 647 (13 L. ed. 294).

The controversy is justiciable.

Pennsylvania v. West Virginia, 262 U. S. 553 (67 L. ed. 1117).

Congress lacks the power to enact the Hawes-Cooper Act.

Hammer v. Dagenhart, 247 U. S. 251 (62 L. ed. 1101);
Bailey v. Drexel Furniture Company, 259 U. S. 20 (66 L. ed. 817).

The power of Congress to restrict or bar any article from interstate commerce is based on the exceptional nature of the article.

Clark Distilling Company v. Western Maryland Railway Company et al., 242 U. S. 311 (61 L. ed. 326);
Lottery Cases, 188 U. S. 321 (47 L. ed. 492);
Hipolite Egg Company v. United States, 220 U. S. 45 (55 L. ed. 364);
Hoke v. United States, 227 U. S. 308 (57 L. ed. 523);
Caminetti v. United States, 242 U. S. 470 (61 L. ed. 442);
Brooks v. United States, 267 U. S. 432 (69 L. ed. 699);
In re Rahrer, 140 U. S. 545 (35 L. ed. 572).

In matters of interstate commerce there are no state lines.

West, etc., v. Kansas Natural Gas Company, etc., 221 U. S. 229 (55 L. ed. 716);
Groves v. Slaughter, 15 Pet. 449 (10 L. ed. 800).

The power to regulate is the power to prescribe rules by which commerce is to be governed.

Gibbons v. Ogden, 9 Wheat, 1 (6 L. ed. 23);
Cooley v. Board of Wardens, 12 How. 299 (13 L. ed. 996).

Under the Articles of Confederation commerce moving from without a state was subject to the laws of the state of destination.

Articles of Confederation, *Article IV*.

The views expressed in the Constitutional Convention, in The Federalist, and in other public writings, show a lack of power on the part of Congress to prohibit transportation.—(Brief, ~~100-115~~ 85-102).

Congress cannot delegate its powers.

Gibbons v. Ogden, supra;
In Re Rahrer, supra.

The states cannot divide an interstate journey into segments.

Brown v. Maryland, 12 Wheat. 419 (6 L. ed. 678);
Robbins v. Taxing District, 120 U. S. 489 (30 L. ed. 694);
George A. Bowman et al. v. Chicago and Northwestern Railway Company, 125 U. S. 524 (31 L. ed. 700).

The court can consider the report of the Senate Committee (No. 844, 70th Congress, 2nd Session, 654-5) in order to ascertain the general purpose of the legislation proposed and the mischiefs sought to be remedied.

United States v. St. Paul, Minneapolis & Manitoba Railway Company et al., 247 U. S. 310 (62 L. ed. 1130);
Duplex Printing Press Co. v. Emil J. Deering, 254 U. S. 443 (65 L. ed. 349).

ARGUMENT

The Complainant May Join All Defendants in One Suit

There is no misjoinder of causes of action or of parties defendant. The main principle of law is the validity of the Hawes-Cooper Act of Congress (Bill, 77). The main questions of fact arise out of the prison activities of the plaintiff as averred in the bill. In this principle of law and these questions of fact, there is a community of interest among the defendants.

The question of misjoinder is discussed at length in the case of *William E. Hale, etc. v. Edward P. Allinson et al.*, 188 U. S. 56 (47 L. ed. 380). This was a suit in equity by a receiver appointed by a state court of Minnesota, who filed his bill in the district court in Pennsylvania against forty-seven stockholders to recover the double liability imposed by law upon them. The Court stated that if there were no precedent for each case coming before the Court such case must

> "be decided upon its own merits and upon a survey of the real and substantial convenience of

all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any. . . . 77 (892)

"We are not disposed to deny that jurisdiction on the ground of preventing a multiplicity of suits may be exercised in many cases in behalf of a single complainant against a number of defendants, although there is no common title nor community of right or interest in the subject-matter among such defendants, but where there is a community of interest among them in the questions of law and fact involved in the general controversy."

78 (892)

In *Marcus K. Bitterman et al. v. Louisville & Nashville Railroad Company*, 207 U. S. 205 (52 L. ed. 171), suit was brought by the railroad company against ticket brokers in New Orleans to enjoin them from dealing in round trip tickets sold upon the occasion of the Confederate Veterans' Reunion in that city and also to enjoin them from dealing in round trip tickets at any

time in the future. Plaintiff averred in the bill that the defendants were joined

> "'because their business and transactions complained of are in act, purpose and effect identical, and in order to prevent a multiplicity of suits, the same relief being sought as to each and all of them.'" 207 (178)

The defendants answered (as stated by the Court)

> "that they were each separately engaged in the ticket brokerage business, duly licensed to conduct such business by the state of Louisiana and the city of New Orleans, and it was expressly denied that the business operations and transactions of all the defendants named in the bill were in act, purpose and effect identical . . ." 210 (174)

They declared their intention to continue the practice in respect to such tickets.

The equity of the bill was upheld, the court saying:

> "The proposition that the bill was multifarious because of the misjoinder of parties and causes of action was not assigned as error in the circuit court of appeals, and, therefore, might well be held not to be open. But passing that view, we hold the objection to be untenable. The acts complained of as to each defendant were of a like character,

> their operation and effect upon the rights of the complainant were identical, the relief sought against each defendant was the same, and the defenses which might be interposed were common to each defendant and involved like legal questions. Under these conditions the case is brought within the principle laid down in *Hale v. Allinson*, 188 U. S. 56, 77." 226 (188)

If the defendant states were not joined in one suit, it appears from the face of the bill that it would be necessary for the complainant to file nineteen separate suits in this Court involving primarily the constitutionality of the Hawes-Cooper Act, and all based on the activities of the plaintiff as averred in the bill. These two issues are common to all defendants.

The cases of *Pennsylvania v. West Virginia* and *Ohio v. West Virginia*, 252 U. S. 563 (64 L. ed. 717) were consolidated upon the order of the Court. The act complained of was a law of the state of West Virginia restricting the transmission of natural gas into the complaining states. Doubtless the facts in each of the plaintiff states as to the results of such restriction were different; but it is not improbable that a joint bill filed by these two states would have been held appropriate by this Court; and doubtless also, if the complainant Alabama had filed a separate suit against each of the nineteen defendants, this Court in its first order would have consolidated all the nineteen cases.

Connecticut v. Massachusetts, 282 U. S. 660 (75 L. ed. 602), was a suit to enjoin Massachusetts from di-

verting waters from the watershed of the Connecticut River. Connecticut invoked the rules of the common law as to riparian use and ownership. The Court said:

> "For the decision of suits between states, federal, state and international law are considered and applied by this court as the exigencies of the particular case may require. . . ." 670 (607)

In *Kansas v. Colorado,* 185 U. S. 125 (46 L. ed. 838), the bill complained of an excessive use by Colorado of the waters of the Arkansas River. Demurrers were filed and set down for argument. The Court in its opinion [145 (846)] referred to the general rule that the truth of material and relevant matters set forth with requisite precision are admitted by demurrer, but hesitated in a case involving questions of so great and far-reaching importance to apply that rule and declined to do so. It said:

> "Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand, and we are unwilling, in this case to proceed on the mere technical admissions made by the demurrer. Nor do we regard it as necessary, whatever imperfections a close analysis of the pending bill may disclose, to compel its amendment at this stage of the litigation. . . ." 146-7 (846)

In 1928 the states of Wisconsin, Minnesota, Ohio and Pennsylvania filed a joint suit against the state of Illinois and the Sanitary District of Chicago [278 U. S. 367 (73 L. ed. 426)]. While the demurrer to the bill was overruled the grounds of demurrer are not indicated; but the report of the case is silent as to the question of misjoinder. Certainly, in the four complainant states the results of the action of the defendants in lowering the levels of the Great Lakes are not identical; though the common question of law was doubtless the same.

When the case of *Rhode Island v. Massachusetts*, 14 Pet. 210 (10 L. ed 428), came on for hearing the question arose as to the failure of the complainant to file exceptions to the defendant's plea. The Court stated that the proceedings would be regulated by the rules and usages of the Court of Chancery but that

> "in a controversy where two sovereign States are contesting the boundary between them, it will be the duty of the court to mould the rules of chancery practice and pleading, in such a manner as to bring this case to a final hearing on its real merits. It is too important in its character, and the interests concerned too great, to be decided upon the mere technical principles of chancery pleading. . . . In ordinary cases between individuals, the Court of Chancery has always exercised an equitable discretion in relation to its rules of pleading, whenever it has been found necessary

to do so for the purposes of justice. And in a case like the present, the most liberal principles of practice and pleading ought unquestionably to be adopted, in order to enable both parties to present their respective claims in their full strength."

257 (445)

In the prior case [*Rhode Island v. Massachusetts*, 12 Pet. 657 (9 L. ed. 1233)] the Court reviewed the history of the times and examined the state of things existing when the Constitution was framed and adopted in order to ascertain the old law, the mischief and the remedy. It set out that at the time of the adoption of the Constitution there were existing controversies between eleven states respecting their boundaries, one of which was between one state and two others. It appears that all the states were engaged in some controversy except South Carolina and Georgia, which had settled their boundary dispute in April preceding a meeting of the general convention which framed and proposed the Constitution in 1787 [723-4 (1260)].

In *Missouri v. Illinois*, 180 U. S. 208 (45 L. ed. 497), the complainant sought to enjoin Illinois and the Sanitary District of Chicago from transporting through an artificial channel into the Illinois River and thence into the Mississippi large quantities of sewage which it was alleged would poison the water supply of the inhabitants of Missouri and injuriously affect the bed or soil of the Mississippi River lying within complainant's territory. The Court [218-24 (504-6)] outlined the history of its

jurisdiction over disputes between states, tracing its origin to the Articles of Confederation.

Early Provisions for Controversies Among More Than Two States (a) Articles of Confederation

At the risk of some repetition of the historical review contained in the next preceding cited case and in the case of *Rhode Island v. Massachusetts*, 12 Pet. 657, 728-4 (9 L. ed. 1233, 1260), supra, but in order to emphasize the provision of Article III, Section 2 extending the judicial power of the Government to disputes between *two or more* states, we trace the history of this provision. Article IX of the Articles of Confederation provided that

> "The United States in congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise between two or more states concerning boundary, jurisdiction, or any other cause whatever;.."

By agreement or by lot a court consisting of at least five "commissioners or judges" was named to decide the dispute. There was no requirement that any be lawyers, which should indicate that meticulous problems of pleading and practice were not expected to be solved.

A committee appointed for that purpose presented its first draft of the Articles of Confederation on July 12, 1776. We find listed under Article XVIII the

powers of "The United States assembled" including that of

> "Settling all Disputes and Differences now subsisting, or that hereafter may arise between two or more Colonies concerning Boundaries, Jurisdictions, or any other cause whatever . . ." (Vol. V, Journals Continental Congress 550)

Congress considered the Articles in committee of the whole and on August 20, 1776, a second printed form was presented in which the provision under discussion is found in Article XIV and changed to the following:

> ". . . deciding all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundaries, jurisdictions, or any other cause whatever . . ." (Vol. V, J. C. C. 681-2)

This quoted excerpt from Article XIV of the second printed draft was stricken on October 27, 1777 (Vol. IX, J. C. C. 841-2) and there was substituted therefor the present Section 2 of Article IX except for a provision as to the selection of commissioners, this provision being changed in the final form of the Articles (Vol. IX, J. C. C. 907, 916).

Before the Articles were finally ratified by Maryland in 1781 disputes among the states had arisen. New Hampshire, New York and Massachusetts had their

difficulties in 1779 over the New Hampshire Grants (Vol. XIV, J. C. C. 674). A boundary dispute between Pennsylvania and Virginia arose in 1779 (Vol. XV, J. C. C. 1411). Pennsylvania and Connecticut had a dispute in 1781 with reference to lands on the east bank of the Susquehanna (Vol. XXI, J. C. C. 1092). A dispute between New Jersey and Virginia was begun in 1784 regarding a tract of land called Indiana (Vol. XXVI, J. C. C. 110). Massachusetts and New York began a territorial dispute in 1784 (Vol. XXVII, J. C. C. 547-550). A boundary dispute arose in 1785 between Georgia and South Carolina (Vol. XXVIII, P. C. C. 861).

(*b*) *Convention of* 1787

With these disputes pending (except the last mentioned) the convention of 1787 was faced with the requirement to fix a jurisdiction to decide them. In the Records of the Federal Convention by Farrand we trace its development. It first appears (May 29, 1787) in the sixth resolution of the Randolph plan as follows:

> ". . . that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation . . ." (Farrand, Vol. I, 21)

On June 13 is set out in the Journal the state of the resolutions submitted by Mr. Randolph and as agreed

to in committee of the whole. The provision is unchanged (Ib. Vol. I, 225).

On July 18 the Journal shows that the thirteenth resolution was amended to read as follows:

> "That the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony" (Farrand, Vol. II, 89).

The result of the proceedings of the convention from June 19 to July 28 and referred to the committee of detail contained in the eighth resolution the provision

> "That the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation; and moreover to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation." (Ib. Vol. II, 131-2)

There was used in the preparation of the final draft of the report of the committee on detail a draft which was in the handwriting of Edmund Randolph and which for the first time extends the jurisdiction of the

Supreme Court to include "disputes between different states" (Ib. Vol. II, 147).

In Mr. Madison's Notes of August 6 there is found in the report of the committee of detail which was presented by Mr. Rutledge the following in Section 2 of Article IX fixing the powers of the senate:

> "In all disputes and controversies now subsisting, or that may hereafter subsist between two or more States, respecting jurisdiction or territory, the Senate shall possess the following powers. . ." (Ib. Vol. II, 183)

This is in substance a copy of Section 2 of Article IX of the Confederation with the change to the Senate as indicated.

In Article XI of the report of the committee (as noted by Mr. Madison) the jurisdiction of the Supreme Court is extended (Section 3)

> "to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) . . ." (Ib. Vol. II, 186)

On August 20 Mr. Pinckney submitted to the convention in order to be referred to the committee of detail several propositions among which was the following:

> " 'The Jurisdiction of the Supreme Court shall be extended to all controversies between the U. S. and an individual State, or the U. S. and the Citizens of an individual State' " (Ib. Vol. II, 342).

On August 22 Mr Rutledge reporting for the committee to which sundry propositions had been referred on August 18 and 20 included in the report an extension of the jurisdiction of the Supreme Court to be inserted after the word "controversies" in Section 3 of Article XI (See citation from Vol. II, 186 hereinabove)

> " 'between the United States and an individual State, or the United States and an individual person' " (Ib. Vol. II, 367).

It will be recalled that the second section (Ib. Vol. II, 183) of Article IX was substantially the same as the second section of Article IX of the Confederation. This second section (with the third section) was stricken on August 24 (Ib. Vol. II, 396). Thereupon no provision remained in the draft of the Constitution for the consideration by any body of controversies between two or more states relating to territory or jurisdiction.

There was referred to the committee of style and arrangement the proceedings of the convention (September 10) which contained in Section 3 of Article XI a provision extending the judicial power

"to controversies between two or more States (except such as shall regard Territory and Jurisdiction). . ." (Ib. Vol. II, 576)

This committee made its report on September 12 in which this exception of jurisdiction as to territory and jurisdiction was corrected, and the jurisdiction of the Supreme Court was extended

"To controversies between two or more States; . . ." (Ib. Vol. II, 600)

This became the final provision on this subject.

In view of the foregoing history it is apparent that from the Declaration of Independence controversies between more than two states were expected and provision was made for their determination.

Complainant's Rights as Sovereign and Proprietor

In *Missouri v. Illinois,* supra, a demurrer was filed to the bill on the ground, among others, that Missouri was only a nominal party to the suit and was lending its name for the benefit of cities and towns located on the banks of the Mississippi River and of persons residing therein, all of whom were the real parties in interest; on the ground also that it appeared upon the face of the bill that

"no property rights of the state of Missouri are in any manner affected by the matters alleged in said bill of complaint; nor is there any such property right involved in this suit as would give this court original jurisdicton of this cause.'" 217-18 (501)

After analyzing many prior cases of original jurisdiction, the Court said:

"The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a state. . . .

". . . It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant state. But it must surely be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them. . . .

"The allegations of the bill plainly present such a case. The health and comfort of the large communities inhabiting those parts of the state situated on the Mississippi river are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the state. Moreover substantial impairment of the health and

prosperity of the towns and cities of the state situated on the Mississippi river, including its commercial metropolis, would injuriously affect the entire state." 240-1 (512)

In *Pennsylvania v. The Wheeling and Belmont Bridge Company, William Ottersan, and George Croft*, 9 How. 647 (13 L. ed. 294), the cause came on before Mr. Justice Grier for preliminary injunction on behalf of the complainant. The bill averred, among other things:

"that the State of Pennsylvania owned and possessed certain valuable public improvements of canals and railways for the transportation of passengers and goods, constructed at a great expense, for cannels of commerce, to connect the waters of the Delaware River with the Ohio at Pittsburg, and the waters of Lake Erie with the Ohio at Beaver. That from the transportation of passengers and goods along these works, she was accustomed to receive large tolls and revenue. That these works terminated at, and are constructed with direct reference to the free navigation of, the Ohio River. That the goods and passengers transported to and from those ports upon her improvements were accustomed to arrive and depart in steamboats along the Ohio River; and that the Wheeling Bridge would so obstruct the navigation of the river as to cut off the trade and business along the public works of Pennsylvania, impair and diminish

her tolls and revenue, and render her improvements useless." 648-9 (294-5)

The bill further charged that

"sundry citizens of Pennsylvania have contracted for, and are engaged in, the construction of ships and sea-going vessels, to be propelled by wind and steam, and desire to continue in said business. That the building of such vessels is a profitable branch of business, and that any obstruction to the navigation of the Ohio River at high stages of water will interfere with and destroy said branch of business, and prove alike detrimental to the revenues of the Commonwealth of Pennsylvania and to the interests of her citizens. . . ." 655-6 (297)

This case came on for final decree and is reported in 18 How. 519 (14 L. ed. 249). The state's investment amounted to about $16,000,000. There was another railroad soon to be completed at an expense of $8,000,000; and reference is made to other lines of communication owned in whole or in part by the state and from which it derived revenue [561 (267)].

The defendants set up in their answer that Pennsylvania had no corporate capacity to institute this suit to vindicate the rights of her citizens; that the state was only a nominal party whose name was, without proper authority, used by individuals [558 (266)].

In discussing its jurisdiction, the Court said that Pennsylvania asks from the Court a protection of its property on the same ground and to the same extent as a corporation or individual may ask it [561 (267)].

It appeared from the testimony that the obstruction on the Ohio River must injuriously affect the revenue from the complainant's public works as it would divert transportation to other lines through New York, thus diminishing the trade and the revenue of the state. It was estimated that commerce to the value of $80,000,000 moved annually over the state's public works.

The court awarded the relief prayed and enjoined the operation of the bridge complained of.

This court has assumed jurisdiction in other cases where the complainant filed suit in its proprietary capacity: In *Texas v. White*, 7 Wall. 700 (19 L. ed. 227), as the owner of United States bonds; in *Florida v. Anderson*, 91 U. S. 684 (23 L. ed. 290), as the beneficial proprietor of a line of railroad.

In *Florida v. Mellon*, 273 U. S. 12 (71 L. ed. 511), cited by opposing counsel, this Court held that Florida had no right to sue the United States to protect its citizens from the payment of a federal inheritance tax; such citizens being citizens of the United States also [16 (514)]. For the same reason relief was denied to the state of Massachusetts in a suit to enjoin the secretary of the treasury from paying out money under an

appropriation of Congress under the Maternity Act.—*Massachusetts v. Mellon*, 262 U. S. 447, 485 (67 L. ed. 1078, 1084).

In *Mayor v. Miln*, 11 Pet. 102 (9 L. ed. 648) the Court, construing an act requiring the master of a vessel entering port to list the names of all passengers landing in New York City, said

> "Can anything fall more directly within the police power and internal regulation of a State, than that which concerns the care and management of paupers or convicts, or any other class or description of persons that may be thrown into the country, and likely to endanger its safety, or become chargeable for their maintenance? . . ." 148 (666)

The State of Alabama is the proper party to file this suit. It acts in both a sovereign capacity in enforcing its laws and caring for its prisoners and in a proprietary capacity as the owner of prison industries and farms used in providing occupation for them. They are its wards. It is the duty of the state to undertake to reform its prison population and train its members so that they may make an honest livelihood upon the expiration of their terms (Bill Sec. 19) and in this situation it is acting as *parens patriae*. The withdrawal of the market for its prison-made goods in the defendant states (Bill Sec. 14); the increased costs of maintaining its idle prisoners (Bill Sec. 18); the neces-

sary cost of creating additional industries to employ its prisoners in the manufacture of state-use products if this should be required (Bill Sec. 20)—all give it grave concern; but its gravest problem is that which inevitably results from the enforced idleness of prisoners. With no productive labor to perform they become restless, untractable, unruly and ultimately desperate, presenting difficult problems to prison officials, sometimes resulting in riots in which prisons are fired with resultant loss of life and property. Nor is it extraordinary for prisoners who sit in idleness day after day and year after year, and who are deprived of productive labor, ultimately to lose their reason and become insane (Bill Sec. 19). Under such conditions the prisoner then becomes a ward of the state for the remainder of his life, or, if he should be released, he becomes a problem for those who otherwise might look to him for assistance and support.

The Controversy Is Justiciable

There is here presented a direct issue between the complainant and nineteen other states where the latter may restrict or forbid the shipment into and sale in such states of a manufactured article, a common subject of commercial dealings, ordinarily moving in an established current of commerce. The complainant seeks an injunction against the enforcement of such statutes, listed in its bill, alleging that such enforcement will be productive of great injury to the complainant. The complainant sues both as proprietor of manufac-

turing institutions used in manufacturing products and of farms used in growing farm products, all of which are ordinarily sold in the defendant states, and, also, as a sovereign state to protect its rights and perform its duties in the matter of conducting its prisons. A somewhat similar state of facts existed in *Pennsylvania v. West Virginia*, 262 U. S. 553, 591 (67 L. ed. 1117, 1129-30), wherein Pennsylvania sought to enjoin the enforcement of a statute of West Virginia which required for local uses the withdrawal of natural gas from a normal course of transmission into Pennsylvania.

Congress Lacks the Power to Enact the Hawes-Cooper Act

The main question in this case is the power of Congress to pass the Hawes-Cooper Act (Appendix 182) divesting prison-made goods of their interstate character. It is urged that the Hawes-Cooper Act (herein sometimes called the Act) is merely permissive and for that reason does not violate the Constitution. The power of Congress to enact legislation within the sphere of its delegated powers is plenary. To exercise any power under the Constitution, that power must be wholly delegated to it. It need not go to the full length of such power.—*Clark Distilling Company v. Western Maryland Railway Company et al.*, 242 U. S. 311 (61 L. ed. 326). In that case it was urged that Congress in passing the Webb-Kenyon Act had exceeded its authority to regulate when it stopped short of exercising that authority to the full limit; Congress having

"simply regulated to the extent of permitting the prohibitions in one state to prevent the use of interstate commerce to ship liquor from another state, . . ." 327 (889)

It was conceded that Congress had the power to *prohibit* the movement of intoxicants in interstate commerce. The converse of this rule is undeniable: If Congress has the power to pass a permissive statute, it has the power to pass a prohibitory statute.

" . . Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed . . . ."—*Brown et al. v. Maryland,* 12 Wheat. 419, 439 (6 L. ed. 678, 686)

In *Clark Distilling Co. v. Ry. Co.,* supra, arising under the Webb-Kenyon Act, (Appendix 188) the Court rested the power of Congress on the exceptional nature of the subject of intoxicating liquors:

"Before concluding we come to consider what we deem to be arguments of inconvenience which are relied upon, that is, the dread expressed that the power by regulation to allow state prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control and therefore destroys the Constitution. The want of force in the suggested

inconvenience becomes patent by considering the principle which after all dominates and controls the question here presented, that is, the subject regulated and the extreme power to which that subject may be subjected. The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guaranties of the Constitution but for the enlarged right possessed by government to regulate liquor, has never that we are aware of been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which under the constitutional guarantees such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace." 882 (841)

The question now before the Court is not new. It has considered it several times. In construing the Child Labor Act (Appendix 133) in the case of *Hammer v. Dagenhart,* 247 U. S. 251 (62 L. ed. 1101), this court said:

"In *Gibbons v. Ogden,* 9 Wheat. 1, Chief Justice Marshall, speaking for this court, and defining the extent and nature of the commerce power,

said, 'It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed.' In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate." 269-70 (1104-5)

The court in its opinion referred to the *Lottery Cases*, 188 U. S. 321 (47 L. ed. 492), the case of *Hipolite Egg Company v. United States*, 220 U. S. 45 (55 L. ed. 364), *Hoke v. United States*, 227 U. S. 308 (57 L. ed. 528), *Caminetti v. United States*, 242 U. S. 470 (61 L. ed. 442), and *Clark Distilling Company v. Western Maryland Railway Company*, supra, saying that in each of these instances

"the use of interstate transportation was necessary to the accomplishment of harmful results. In

other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended." 271 (1105)

The court found in the Child Labor Case that this element (the accomplishment of harmful results) was entirely wanting.

". . . The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the states who employ children within the prohibited ages. The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless. . . . . When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to Federal control under the commerce power. 271-2 (1105-6)

* * *

"Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulation. 272 (1106)

* * *

"It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other states where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the state of production. In other words, that the unfair competition, thus engendered, may be controlled by closing the channels of interstate commerce to manufacturers in those states where the local laws do not meet what Congress deems to be the more just standard of other states. 273 (1106)

"There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may cooperate to give one state, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions. In some of the states laws have been passed fixing minimum wages for women, in others the local law regulates the hours of labor of women in various employments. Business done in such states may be at an economic disadvantage when compared with states which have no such regulations; surely this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the

hours of labor and the rate of compensation for women have not been fixed by a standard in use in other states and approved by Congress. 278 (1106)

"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture. 278-4 (1106)

"The grant of authority over a purely Federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the 10th Amendment to the Constitution. 274 (1106)

* * *

"A statute must be judged by its natural and reasonable effect. . . . . The control by Congress over interstate commerce cannot authorize the exercise of authority not intrusted to it by the Constitution. . . . . The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters intrusted to the nation by the Federal Constitution. 275 (1107)

"In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are intrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. *Lane County v. Oregon*, 7 Wall. 71, 76. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. . . . To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the Federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states. 275-6 (1107)

"We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the states. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the Constitution. 276 (1107)

"In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states, a purely state authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed." (276 (1107)

The proponents of the Hawes-Cooper Act distinguish the Child Labor Case by stating that the law in that instance *prohibited* interstate transportation absolutely without regard to whether the resultant interstate commerce would be in accord with, or in violation of, state laws; while the Act is merely permissive and does not seek to interfere with the operation of state laws nor to regulate by federal law matters wholly within the authority of the individual states; that by the Act Congress was seeking merely to relieve the states of an impediment to and exercise of an admitted

power to regulate and control commercial transactions within the state and to pass laws necessary and proper in the exercise of the state police power.

We shall undertake to show that there can be no distinction between the Hawes-Cooper and the Child Labor Acts. As pointed out, questions of power do not depend on the degree to which it may be exercised. If Congress, as is now insisted, has the power to pass an act permitting states to outlaw goods which are not harmful to the public health, morals or welfare, it has the power also to bar such goods from interstate commerce.

After the decision in the Child Labor Case (June 8, 1918) Congress undertook to reach employment of child labor through a revenue measure (Appendix 188) which was considered by the Court in the case of *Bailey v. Drexel Furniture Company*, 259 U. S. 20 (66 L. ed. 817). The law was attacked as in conflict with the 10th amendment and defended on the ground that it was a mere excise tax. The court said:

> ". . . We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a pen-

alty? If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. That course of business is that employers shall employ in mines and quarries, children of an age greater than sixteen years; in mills and factories, children of an age greater than fourteen years, and shall prevent children of less than sixteen years in mills and factories from working more than eight hours a day or six days in the week. . . ." 86 (819)

The Court said further:

". . . . In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it? 87 (819)

"It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress but left or committed by the supreme law of the

land to the control of the states. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half. 87 (819)

* * *

"The analogy of the *Dagenhart Case* is clear. The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax, and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a state in order to coerce them into compliance with Congress's regulation of state concerns, the court said this was not in fact regulation of interstate commerce, but rather that of state concerns and was invalid. So here the so-called tax is a penalty to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the

state government under the Federal Constitution. . . ." 89 (820)

In *Brooks v. United States*, 267 U. S. 432 (69 L. ed. 699), the question was the validity of the National Motor Vehicle Theft Act (41 Stat. at L. 324). The act was upheld. The Court said:

" . . . . Congress can certainly regulate interstate commerce to the extent of forbiding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce. . . ." 436-7 (701)

The court proceeds to analyse the Lottery and other cases of like kind and to distinguish them from the Child Labor cases, saying:

". . . . Articles made by child labor and transported into other states were harmless, and could be properly transported without injuring any person who either bought or used them. In referring to the cases already cited, upon which the argument for the validity of the Child Labor Act was based, this court pointed out that, in each of them, the use of interstate commerce had contributed to

the accomplishment of harmful results to people of other states, and that the congressional power over interstate transportation in such cases could only be effectively exercised by prohibiting it. . . ." 488 (701)

The Wilson Act

But it is insisted that the opinion of the Court construing the Wilson Act (Appendix 143) affords authority for the passage of the Hawes-Cooper Act.

The Webb-Kenyon Act expressly prohibited the shipment of intoxicating liquors in interstate commerce into the state of destination where such liquors were intended by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of such state. The Hawes-Cooper Act undertakes to follow the terms of the Wilson Act but there is an important difference: Upon arrival in the state of destination liquors are subject to the operation of local laws *enacted in the exercise of its police powers* to the same extent and in the same manner as though such liquors had been produced in such state, while in the Act prison-made goods upon arrival and delivery in the state of destination are subject to the operation and effect of the laws of such state to the same effect and in the same manner as though they had been manufactured, produced or mined therein.

The argument, therefore, that the case *In re Rahrer*, 140 U. S. 545 (35 L. ed. 572) is an authority in support of the Act cannot be sustained. The Court based its decision in the Rahrer case on the police power of the states and begins its opinion thus:

> "The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive." 554 (574)

The Court quoted from the opinion of Mr. Justice Catron in the *Licenses Cases* [5 How. 504 (12 L. ed. 256)] as follows:

> ". . . . The assumption is, that the police power was not touched by the Constitution, but left to the States as the Constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the State, then the regulation may be made by the State, and Congress cannot interfere. But this must always depend on facts, subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of, foreign com-

merce, or of commerce among the States. If, from its nature, it does not belong to commerce, or if its condition, from putresence or other cause, is such when it is about to enter the State that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction. And as an incident to this power, a State may use means to ascertain the fact. . . . 599-600 (299)

"What, then, is the assumption of the state court? Undoubtedly, in effect, that the State had the power to declare what should be an article of lawful commerce in the particular State; and, having declared that ardent spirits and wines were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached, and consequently the powers of Congress could not interfere. The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws, and asserted as the state policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the State is attempted to be created, in a case where it did not previously exist." 599-600 (575)

Then follows the paragraph from the Court's opinion which has been so often quoted by the proponents of the Act as authority for its validity:

> "No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so." 562 (577)

It is apparent from reading the entire case that this paragraph applies to the commodity then under consideration, i. e., intoxicating liquors.

The Court stated that the laws of Iowa which were being invoked to support a prosecution for selling liquor in the original package

> 'had been passed in the exercise of its police powers, and applied to the sale of all intoxicating liquors whether imported or not, there being no exception as to those imported, and no inference arising, in view of the provisions of the State Constitution and the terms of the law, (within whose mischief all intoxicating liquors came,) that the State did not intend imported liquors to be included. . . ." 564 (577)

Thus, it will be seen that the Court sustained the Wilson Act on the ground that the power delegated to Congress to regulate commerce was subject to the reserved police powers of the states and that in the exercise of such police powers the state had the right to prohibit commerce in the state in any commodity which

endangered the lives, the health, the safety, the welfare or the morals of its people; that as to such commodities the Court held that they could be released by Congress from the protection of interstate commerce upon arrival in that state, so that they might immediately become subject to the local laws of the state enacted for the protection of its citizens from the harm incident to such commerce. The court held that intoxicating liquor was a thing harmful in its nature, and, hence, where a state prohibited its manufacture or sale within its borders, Congress could properly divest interstate shipments of that article of their interstate character upon arrival in that state, so that such shipments might at once become subject to the police regulations of such state and so that the laws enacted in the exercise of its police powers for the protection of the health, safety and welfare of its citizens, could be enforced upon such shipments from the instant of their arrival and delivery in the state.

The Hawes-Cooper Act proposes to change the basis on which the Wilson Act was declared valid. It is not the character of the goods which are outlawed, but the character of the labor employed in producing the goods. There is nothing harmful in a piece of furniture, a work shirt, an automobile license plate or a package or binder twine merely because it was manufactured wholly or in part by prison labor. Nor do wheat, corn and potatoes produced by prison labor, or coal partly mined by it, differ from those produced or mined by free labor. There is, therefore, no justification in barring them

from sale on the ground that the public health, safety or morals are to be protected.

Prison-made goods upon arrival and delivery in the state of destination are not made subject to laws enacted merely in the exercise of the state's police powers, but they are made subject to any class of laws which the state may enact. Their treatment does not enable the state to protect the public health, safety and welfare through its police powers, but to protect from competition those who may be engaged in the manufacture or sale of goods of like kind.

Has Congress the Power to Grant Permission to a State to Bar All Commerce?

Let us assume for the moment the validity of the Hawes-Cooper Act. Where does it lead us? If Congress can permit a state to outlaw prison-made goods, it can lend its power to that state to place a ban on goods produced in an open shop in another state; or goods produced by foreign, Chinese, Negro, or any other class of, labor. Bibles printed by non-union printers in other states could be barred from sale. Indeed, Congress could permit a state to prohibit the sale therein of any products from the mills of Alabama or from its fields or mines, however they may be produced. Or Congress could permit the state to reverse the problem now presented and forbid the shipment beyond its borders of any product which the state government sought to keep for its own people. There is no dividing line,

once this claimed power on the part of Congress is upheld. We retrace our steps 176 years to the condition of the colonies under the Articles of Confederation, and repeat the conflicts of commercial interests that came near wrecking our early government. Obviously, from the unhappy condition of commerce in 1787 the states would not have delegated to Congress the power to prohibit commerce. The unanimity with which both federalist and anti-federalist supported the proposal to extend to Congress the power to regulate commerce is a complete answer to the assertion that the prohibitory power was delegated. Hesitating as the states did to extend the powers of the general government, and difficult as it was to secure the ratification of the Constitution, it is beyond belief that any thought or suggestion ever seriously occurred that the states were giving up their sovereign powers to a national government, feared by a considerable minority of the people, to build an embargo around their borders.

It is obvious also that from the adoption of the interstate commerce clause the power to prohibit trade was not reserved to the states. It is not extraordinary that such a power should be suspended. The division of sovereignty by the people of each state did not necessarily place in both governments all the powers of a people. True, there was delegated to Congress the complete sovereign power of all the states in many matters, as the coining of money, declaring war, making treaties, etc. In the matter of taxes both governments retained powers. As to commerce Congress was given full pow-

er to *regulate* all except intrastate commerce which was reserved to the states. The states delegated to Congress the right to exercise *all* the powers theretofore held by all the states to *regulate* commerce with foreign nations, among the states and with the Indian tribes. But the power of prohibiting commerce, of establishing embargoes among states, was not granted to Congress under the commerce clause, which delegated only the right to exercise all the powers of all the states for *regulating* such commerce. The power to probihit commerce with foreign nations through embargoes, and with the Indian tribes, is found in other provisions of the Constitution—the treaty-making power (Article II, Section 2), and the power to make rules and regulations respecting the territory of the United States (Article IV, Section 3). The power to prohibit commerce among the states is nowhere given. It remains in suspense. It is one of the ungranted powers which the states are prohibited by implied covenant from exercising. If the Union should be dissolved, each sovereign state as an independent nation would again be vested with its full commercial powers, both regulatory and prohibitory.

Under Article IV of the Confederation goods shipped in interstate commerce were subject to the same duties, impositions and restrictions as were goods manufactured in the state of destination. If a state law prohibited the manufacture or sale of certain goods, then no such goods imported from another state could be sold in the state of destination because the imported goods

were subject to the state laws upon their arrival and delivery in the state. Under the Hawes-Cooper Act Congress attempts by divesting interstate shipments of prison-made goods of their interstate character upon their arrival and delivery in the state of destination to make them immediately subject to state laws as fully as if manufactured in that state, just as was the case with all interstate shipments under the Articles of Confederation.

Fortunately we still move forward. The court has met these views in other forms. *West, etc., v. Kansas Natural Gas Company, etc.,* 221 U. S. 229 (55 L. ed. 716), arose out of a statute of Oklahoma undertaking to restrict the transportation of natural gas to points outside the state by giving to domestc corporations the exclusive right of eminent domain and the use of highways The Court, referring to gas as a commodity and, when reduced to possession as the individual property of the owner, said:

> ". . . . The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the state, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of

a state would confine them to the inhabitants of the state. If the states have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines.' In such commerce, instead of the states, a new power appears and a new welfare, a welfare which transcends that of any state. But rather let us say it is constituted of the welfare of all the states and that of each state is made the greater by a division of its resources, natural and created, with every other state, and those of every other state with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court." 255-6 (726)

In *Groves v. Slaughter,* 15 Pet. 449 (10 L. ed. 800), the Court said:

". . . . The United States are considered as a unit, in all regulations of foreign commerce. But this cannot be the case where the regulations are to operate among the several States. The law must be equal and general in its provisions. Congress cannot pass a non-intercourse law, as among the several States; nor impose an embargo that shall affect only a part of them." 505-6 (821)

The Power to Regulate

What is this power to regulate? The Court has considered it many times but it has never departed from Marshall's definition in *Gibbons v. Ogden,* 9 Wheat. 1 (6 L. ed. 23).

"It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent and acknowledges no limitations, other than are prescribed in the Constitution. These are expressed in plain terms, . . . 196 (70)

* * *

". . . . As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed

words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. . . . 188-9 (68)

* * * * *

" . . . it has been said, that the construction does not confer the right of intercourse between state and state. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. . . . The constitution found it an existing right, and gave to Congress the power to regulate it. . . . 211 (87)

"The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. . . ." *Cooley v. Board of Wardens,* 12 How. 299, 316 (13 L. ed. 996, 1003).

" 'To regulate,' in the sense intended, is to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.

"This power over commerce among the States, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce." *Second Employers Liability Cases*, 223 U. S. 1, 47 (56 L. ed. 327, 345)

Meaning and use of "Regulate" Among the Colonies

An examination of of the dictionaries[1] of different

[1]"Regulate. To rule, to beare sway."—(Dictionarie of 1623 Henry Cockeram). "To Regulate, to govern, direct or guide; to frame or square, to determine or decide."—(English Dictionary-1708 Kersey). "To Regulate [reguler, F. regulatum, L.] to set in Order, to govern, direct or guide; to frame or square; to determine or decide."—(English Dictionary-1726 Bailey). "To Regulate, reg-u-late, v. a. To adjust by rule or method; to direct."—(English Dictionary-1780 Sheridan.) "To regulate, 1 to square, rule, frame, or direct. 2 to govern, or guide. 3 to discipline, or instruct. 4 to settle, or fix. 5 to decide, or determine." —(English Dictionary-1754 Martin). "To Regulate, reg-u-late, v. a. To adjust by rule or method; to direct."—(English Dictionary-1797 Sheridan). "To

periods indicates no perceptible change in the meaning of the word "regulate" for the past three hundred years. It meant the same thing when the colonies were founded that it meant when the Constitution was adopted and that it means today. The word "regulate" is contained

---

Regulate, reg-u-late, v. a. To adjust by rule or method; to direct."—(English Dictionary—1819 Walker) "Regulate, reg-u-late, v. t. To adjust by rule, method or established mode. To put in good order. To subject to rules or restrictions."—(English Dictionary-1850 Boag). "Regulate (reg-u-lat) v. t.; pret. and pp. regulated, ppr. regulating, L. regulatus, pp. of regulare [It. regolare—Sp. reglar, regular—Pg. regular, reglar—F. regler), direct, rule, regulate, regula rule: see rule. Cf. regle, rail, v.] 1. To adjust by rule, method, or established mode; govern by or subject to certain rules or restrictions; direct. 'If we think to regulat Printing, thereby to rectifie manners, we must regulat all recreations and pastimes, all that is delightfull to man.' Milton, Areopagitica, p. 23. 'When I travel, I always choose to regulate my own supper.' Goldsmith, She Stoops to Conquer, p. ii. 1. 'One of the settled conclusions of political economy is that wages and prices cannot be artificially regulated.' H. Spencer, Social Statics, p. 501. 2. To put or keep in good order; as, to regulate the disordered state of a nation or its finances; to regulate the digestion. 'You must learn by trial how much half a turn of the screw accelerates or retards the watch per day, and after that you can regulate it to the utmost nicety.' Sir E. Beckett, Clocks, Watches, and Bells, p. 300. 3. Specifically, in musical instruments with a keyboard, so to adjust the action that it shall be noiseless, prompt, and sensitive to the touch.—Syn. 1. Rule, Manage, etc. See govern." —(The Century Dictionary-1890 Vol. V).

in many laws enacted by colonial legislative bodies prior to and immediately following the adoption of the Constitution, as well as by legislative bodies of the states admitted to the Union after 1789[2]. No difference is

[2]Conn. An act for regulating the assize of bricks—Conn. Colonial Laws 1668, p. 16. An act for regulating trials on writs of error, and for limiting the time of bringing the same. Ib. p. 48. An act for regulating fees. Ib. p. 58. An act for regulating, and inspecting and building of ships, and other vessels. Ib. p. 224. An act for regulating naval officers-Conn. Acts and Laws 1775, p. 407. An act in addition to a law of this state entitled an act for regulating gaols and gaolers. Ib. 1789, p. 880. An act to regulate the selling of spirituous liquors. Ib. 1818, p. 124. An act for licensing and regulating lottery offices—Conn. Pub. Stat. Laws 1825, p. 76.

Mass. An act for regulating the exportation of tobacco and butter, and the weight of onions in bunches, and the size of lime-casks—Mass. Acts and Laws 1780-1785, p. 486. An act repealing in part an act, entitled, "An act to regulate the weight of Beef and Pork."—Mass. Laws 1816, p. 119.

N. H. An act to regulate trading with the Indians—Laws of N. H. Vol. 2-1702-1745, p. 119. An act for the regulation of navigation and commerce—Ib. Vol. 5, p. 78. An act to vest the United States in Congress assembled, with full power to regulate trade, and enter into treaties of commerce—Ib. p. 208. An act to regulate the exportation of beer and pork—Ib. p. 759. An act for regulating the manufacture and sale of bread—Ib. Vol. 6, p. 458.

found in the meaning at any period of time during the

R. I. An act regulating trade within this colony, and establishing proper offices for entering and clearing vessels and merchandize—R. I. Acts and Resolves 1776, p. 118. An act in addition to an act intituled, an act vesting Congress with the power of regulating foreign trade—Ib. 1785, p. 10. An act for regulating trade and commerce—Ib. p. 29. An act vesting the United States in Congress assembled with the power of regulating trade and commerce, both foreign and domestic 1786, p. 6.

N. Y. An act to regulate the collecting the duty of excise on strong liquors retailed in this colony—N. Y. Colonial Laws Vol. 4 (1755), p. 1. An act for regulating the pilots, and establishing their pilotage between Sandy Hook and the Port of New York, and other the purposes therein mentioned, Ib. p. 178 (1757). An act to amend an act entitled "An Act for Regulating the Militia of the Colony of New York." Ib. p. 178 (1757). An act further to continue an act entituled an act to regulate the gauging of rum brandy and other distilled liquors and molasses and other purposes therein mentioned. Ib. p. 199 (1757). An act for the better regulating and further laying out publick highways in Queens County. Ib. p. 503 (1760). An act for the more effectual prevention of fires and for regulating of buildings in the city of New York. Ib. p. 571 (1761). An act for the better regulating the taxation of estates in Suffolk County. Ib. p. 677 (1762). An act for regulating the sale of goods to be sold at public vendue, auction or outcry within this colony. Ib. p. 1098 (1769). An act further to regulate the inspection and branding of flour. Ib. Vol. 5, p. 197 (1771). An act for the better laying out regulating, clearing keeping in repair the public roads and

history of this country. In all these laws there is found

highways in the counties of Albany and Tryon. Ib. p. 869 (1772). An act for regulating the practice of innoculation for the small pox in the city of Albany. Ib. p. 459 (1773). An act for the better regulating the militia of the colony of New York. Ib. p. 782 (1775). An act to regulate elections for Representatives in General Assembly for the city and county of Albany. Ib. p. 874 (1775). An act to regulate inns and taverns, within this state—Laws of New York, p. 104 (1780). An act to regulate the militia. Ib. p. 225 (1782). An act for the regulation of sales by public auction—Laws of N. Y., seventh session, p. 6 (1784). An act for regulating the fees of the several officers and ministers of justice within this state—Ib. p. 88 (1789). An act to regulate the practice of physic and surgery within the city and county of New York. Ib. p. 88 (1792). An act for the prevention of fires and regulating the assize of bread in the town of Brooklyn, in Kings county, and for other purposes therein mentioned. Ib. p. 84 (1797). An act to regulate the fishery in Otsego Lake. Ib. p. 489 (1798). An act to regulate the passing of carriages, waggons, carts and sleighs by each other in the city of New-York. Ib. p. 648 (1799). An act for establishing and regulating a ferry across the Hudson-river between the counties of Westchester and Rockland. Ib. p. 41 (1800). An act to regulate ferries within this state. Ib. p. 168 (1797). An act to regulate the fees of public notaries. Ib. p. 277 (1815). An act regulating the manufacturing of salt in the town of Salina. Ib. p. 458 (1825).

N. J. An act for regulating of marriages—N. J. Laws of the Province, p. 332 (1698). An act to regulate the size of traps to be hereafter set in this colony—Laws of N. J., p. 865 (1760). An act for the better

some pre-existing subject to be adjusted, put in order,

regulating the militia—N. J. Acts, p. 26 (1777). An act for regulating navigation and trade in this state. Ib. p. 10 (1781). An act to regulate the practice of physic and surgery, within the state of New Jersey —Laws of N. J., p. 51 (1788). An act for regulating and shortening the proceedings in the courts of law—N. J. Acts p. 75 (1784). A nact to amend an act, intitled, an act to regulate the fisheries, and to prevent the obstructions of the navigation of the river Delaware. Ib. p. 211 (1785). An act to regulate waggons and other wheel-carriages within the state of New-Jersey—N. J. Laws of the Province, p. 80 (1787). An act to regulate the issuing of writs of certiorari—N. J. Laws, p. 900 (1798). An act regulating proceedings and trials in criminal cases Ib. p. 162 (1795). An act to regulate certain fisheries in the river Delaware. Ib. p. 579 (1799). An act to regulate fees. Ib. p. 582. An act to regulate the practice of the courts of law. Ib. p. 355. An act to regulate certain fisheries in the river Delaware. Ib. p. 416. An act, regulating the mode of putting Pine timber into Connecticut river. Ib. p. 7 (1808).

Pa. An act for the regulating of streets and water courses in the cities and towns of this government—Penn. Stat. at L. Vol. II p. 65 (1700). An act for regulating retailers of liquors near the iron works. Ib. Vol. IV p. 301 (1785). An act for regulating and establishing fees. Ib. Vol. V p. 161 (1751). An act to regulate the assize of bread. Ib. Vol. VI p. 69 (1760). An act for regulating the hire of carriages to be employed in his Majesty's service. Ib. p. 298 (1762). An act for regulating chimney sweepers within the city of Philadelphia, the district of Southwark and the township of the Northern Liberties. Ib. Vol.

governed. In none of them is there any suggestion of

VIII p. 171 (1771). An act to regulate the militia of the commonwealth of Pennsylvania. Ib. Vol. IX p. 75 (1776). An act for the regulation of wagons, carriages and pack horses for the public service. Ib. p. 181 (1777). An act for regulating the prices of the several articles herein mentioned for a limited time. Ib. p. 236 (1777). An act for regulating of hawkers and peddlers. Ib. Vol. XI p. 295 (1782). An act to regulate the fisheries in the rivers Delaware and Lehigh, and for the preservation of the fish in the said rivers. Ib. p. 300 (1782). An act to regulate the manner of selling loaf bread, and to repeal certain existing laws respecting the same. Ib. Vol. XV p. 541 (1797). An act to regulate the general elections within this commonwealth. Ib. Vol. XVI p. 163 (1799). An act to regulate voting by proxy, in the several incorporated banks within this commonwealth—Penn. Laws 1812, p. 85. An act to regulate the public printing. Ib. p. 57 (1824).

Del. An act for regulating peddlars within the government of the counties of New-Castle, Kent and Sussex upon Delaware—New Castle Laws, p. 86 (1706). An act for regulating fences within this government. Ib. p. 110 (1730). An act for regulating attachments within this government. Ib. p. 184 (1734). An act for regulating prisoners of war brought into this state—Delaware Laws, p. 82 (1779). An act for the regulation of certain water gristmills in New-Castle County. Ib. p. 28 (1785). An act to regulate marriages. Ib. p. 163 (1788). An act to regulate the courts in this state. Ib. p. 96 (1793). An act for regulating the ferry over Christiana creek, in New Castle County. Ib. p. 31 (1797). An act to regulate the practice of medicine and surgery in this state. Ib. p.

prohibition on the part of the government.

---

880 (1818-1819). An act regulating the general election. Ib. p. 892.

Md. An act for regulating the gauging of casks in the town of Baltimore—Stat. at L. 1774. An act to regulate the militia. Ib. 1777. An act to regulate public ferries. Ib. 1781. An act to regulate the inspection of tobacco. Ib. 1789. An act to regulate elections. Ib. 1799. Lib. JG. No. 3 fol. 287. An act to establish pilots, and regulate their fees. Ib. 1803. Lib. JG. No. 4, fol. 424. Supplements, 1815, ch. 177, and 1817, ch. 89. An act regulating Attornies fees. Lib. TH. No. 2, fol. 608. Maryland Laws 1810. An act to regulate the inspection of lumber Lib. TH. No. 3, fol. 87. ch. 141. Ib. 1811. An act to regulate lotteries. Lib. TH. No. 6, fol. 80. Supplements ch. 210, and 1818, ch. 1719. Ib. 1817.

Va. An act regulating ordinaries, and the prices of liquors—Hening's Stat. at L. Vol. 2 p. 393 (1676-7). An act for regulating and ascertaining county court clerk fees. Ib. Vol. 3 p. 153 (1696). An act for the regulation and settlement of ferries; and for the dispatch of public expresses. Ib. p. 469 (1705). An act for regulating the size and dimensions of staves, heading, and shingles, intended for exportation to Madeira, and the West Indies. Ib. Vol. 6 p. 283 (1732). An act for regulating the fees and accounts of the practicers in phisic. Ib. Vol. 4 p. 509 (1736). An act to regulate the price of Indian corn in the present scarcity. Ib. p. 553 (1755). An act for regulating and fixing the salaries of the officers of civil government. Ib. Vol. 12 p. 48 (1785). An act to regulate the inspection of flour and bread. Ib. p. 515 (1787). An act to regulate the suing out, and prosecuting writs of for-

In addition to the use of the word "regulate" in con-

cible entry and detainer. Ib. p. 108 (1788). An act to reduce into one, the several acts for regulating pilots, and ascertaining their fees—Virginia Stat. at L. (Shepherd)—continuation of Hening N. S. 1 p. 169 (1792). An act for regulating inland navigation on Patowmac river, above tide water. Ib. p. 280 (1793). An act to amend an act, entitled, "an act for regulating the navigation of James River, above the falls of said river"—Virginia Acts, p. 112 (1817-18).

N. C. An act to amend an act, intituled, an act for regulating the pilotage of Cape Fear River, and for other purposes—N. C. Revised Acts 1778, p. 363 (1766). An act to regulate the issuing of marriage licenses. Ib. p. 433 (1770). An act for regulating ordinaries, houses of entertainment, and ferries, and other purposes. Ib. p. 501 (1779). An act for authorising the United States in Congress assembled, to regulate the trade of this state with foreign nations. Ib. p. 632 (1784). An act for the regulation of commerce. Ib. p. 649 (1785). An act for the regulation of commerce—N. C. Laws, p. 6 (1785). An act to regulate the practice of physic. Ib. p. 719 (1791). An act for regulating ordinaries, houses of entertainment, and retailers of spirituous liquors by the small measure. Ib. p. 11 (1798).

S. C. An act for laying a tax or duty on skins and furrs, for the publick use of this province, and regulating the Indian trade—S. C. Laws of the Province No. 78 (1691). An act for the regulating the Indian Trade, and making it safe to the publick. Ib. p. 150 (1707). An additional act to an act for regulating taverns and punch-houses. Ib. p. 335 (1719-20). An act for the better settling and regulating of pilots, and

nection with commerce, it was used very frequently in

for erecting and supporting beacons near the barr and harbour of Charles Town. Ib. 1784, No. 575. An act to regulate the weighing of the several commodities and merchandise in this province—S. C. Public Laws, 1746 p. 208. An act for regulating the assize of bread. Ib. p. 219 (1749). An act to authorize the United States in Congress assembled, to regulate trade from the British West Indies—Laws of S. C. 1784, pp. 21-22.

Ga. An act for regulating the militia of this province and for the security and better defence of the same —The Colonial Records of Georgia p. 7 (1755). An act for regulating taverns and punch houses and retailers of spirituous liquors. Ib. p. 218 (1757). An act for encouraging the cultivation of Hemp Flax and wheat and for regulating the inspection of Hemp Flax and wheat flour. Ib. p. 89 (1768). An act to regulate the Indian trade and for other purposes therein mentioned. Ib. p. 805 (1784). An act to regulate the pilotage of vessels to and from the several ports of this state—Laws of Georgia, p. 592 (1799). An act to regulate the navigation of the Savannah River, between the cities of Savannah and Augusta, so far as respects the patroons of boats. Ib. p. 832 (1806). An act to establish and regulate the inspection of flour. Ib. p. 66 (1811).

Ind. An act to regulate elections—1817, p. 85, ch. IX. An act to regulate the inspection of tobacco —1816, p. 98, ch. XI. An act to regulate marriages —1818, p. 224, ch. XXXIV.

Miss. An act to regulate the elections in this state—Miss. Laws p. 188 (1818).

other instances in the debates in the constitutional convention as shown in House Document No. 398. 69th Congress, 1st Session (containing documents illustrative of the Formation of the Union; herein sometimes referred to as H. D. 398.) Examples of its use are as follows:

"Commercial regulations," 115, 584, 684; "regulation of trade", 205, 206, 847, 486, 586, 781, 776, 779, 885, 871; "regulation of . . . taxes", 248; "regulate the number of representatives", 348, 383, 468, 472, 473; "regulate the representation by a periodical census", 348; "regulating navigation", 482; "regulation" (the adjournment of either house for more than three days; not to extend to the senate when sitting under certain conditions), 474; "regulate" the property qualifications of members of Congress, 513; "regulating the qualifications" (of the electors and elected), 514; "regulating

---

Ohio. An act for opening and regulating roads and highways—Laws of Ohio p. 207 (1804). An act to regulate the navigation of the Great Miami river and its main branches. Ib. p. 65 (1811). An act in addition to the several acts regulating the navigation of the Great Miami river, and its main branches. Ib. p. 195 (1816).

Tenn. An act to regulate and ascertain sheriff's fees, p. 58 (1803), ch. XXI.

Vt. Laws of Vermont, February 1779, Acts were passed "regulating" public accounts, p. 59; sheriffs, p. 62; jurors and juries, p. 65; fisheries, p. 78; taverns, p. 89; pleas and pleadings, p. 97.

qualifications" (of members of Congress), 514; "commercial regulations", 527; "regulate trade", 582, 555, 687, 781; "regulation" (as to forbidding a member of Congress from holding any other office), 542; "regulating trade," 555, 619, 629; "regulate affairs" (with the Indians), 563; "to regulate stages on the post roads", 564; "regulation of expenditures", 578; "regulation of eating and drinking", 574; "regulation of exports", 585; "regulation of imports", 586; "equitable regulations" (on commerce from other nations), 586; "regulate the modes of furnishing" the militia, 599; "regulation . . . to tax the Western states" (the regulation referred to being the provision forbidding states from taxing exports, this being thought necessary to prevent the Atlantic states from taxing the Western states), 631; "regulations" (to provide for the execution of judgments in other states), 632; "oppressive regulations" (resulting from five distinct commercial interests in lieu of two-thirds majority), 634; "foreign regulations" (commercial), 634; "regulations" pushed by the Northern states too far as to commerce, 635; "regulation", referring to two-thirds vote in passing navigation laws, 640; "regulations" subsisting in other states into which persons held to service escape, 711; "regulations" to be made by Congress respecting territory, 711; "regulation of tonnage", 731; "regulations are intended to be perpetual", Madison referring to the Constitution, 795; "regulate the post off.", 857-8; "Regulations of the General Govt.," 871.

The state of commerce in the colonies at the time of the adoption of the Constitution and prior thereto, is shown by the laws on this subject in existence at the time. An examination of the same beginning with those of the earliest law-making bodies indicates conflict among the colonies, embargoes on some articles and prohibitons on others, with the result that each colony, so far as commerce was concerned, was a complete nation unto itself. It is interesting to note the titles of several laws of each colony on this subject.[3]

---

[3]Mass. An act to prevent sundry articles being exported from this to the neighboring states.—Mass. Bay, Boston, Sept. 1779, p. 1114. An act forbidding the exportation of timber without the consent of the governor.—Laws New Plymouth 1628, Vol. 2, p. 28. An act forbidding the sale of sheep out of the colony.—Ib. 1688, p. 31. An act forbidding the exportation of raw hides. Ib. 1658, p. 119. An act forbidding the exportation of iron. Ib. p. 182. An act forbidding the exportation of raw hides without permission.—Colonial Laws of Mass. 1672, p. 205. An act forbidding the exportation of sheep's wool. Ib. 1675, p. 219. An act to restrain the exportation of raw hides ,etc.—Mass. Province Laws 1693-4, p. 152. An act to prohibit the exportation of grain, etc. Ib. 1695-6. p. 226. An act to restrain the exportation of provisions. Ib. 1697, p. 481. An act to prohibit the exportation of corn grain. Ib. 1713-14, p. 724. An act to prohibit trade and commerce with the eastern Indians. Ib. 1721-2, p. 228. An act for laying sundry duties on such goods as shall be imported into this province from the province of New Hampshire or on such as shall be exported from this province thither. Ib. 1721-2, p. 230. An act for preventing the exportation of provis-

Reference to commerce is contained in the Declaration

ions and warlike stores out of this province. Ib. 1755-6, p. 870. An act to prohibit the exportation of lumber for a limited time.—Province of Mass. Bay Acts, Aug. 1776, p. 558. An act regulating the exportation of flax-seed, pot-ash, pearl-ash, beef, pork, barreled fish, and dried fish—Mass. Acts and Laws 1780-85, p. 409 (1784). An act regulating the exportation of tobacco and butter, and the weight of onions in bunches, and the size of lime-casks. Ib. 1785, p. 486. An act . . . laying duties of impost and excise. Ib. 1786, p. 67. An act to prevent the exportation of green or unmanufactured calf skins, out of this commonwealth, by land or water. Ib. 1787, p. 658.

N. H. An act relating to reciprocal trade relations with Massachusetts—Laws N. H. Vol. 1, 1679-1702, p. 46. An act for impost and tunnage, etc. Ib. Vol. 2, 1702, p. 47. An act to prevent the transportation of live cattle, beef, rum and molasses, out of this state. Ib. Vol. 4, 1780, p. 289. An act for laying an impost duty on sundry goods imported into this state. Ib. 1784, p. 562. An act for the regulation of navigation and commerce. Ib. 1785, p. 78. An act to establish certain impost duties on various foreign articles imported into this state. Ib. 1786, p. 146. An act in addition to an act entitled "An act to establish, certain impost duties on various foreign articles imported into this state." Ib. 1787, p. 263. An act to revive and continue in force, an act, entitled, an act to establish certain impost duties on various foreign articles imported into this state. Ib. 1788, p. 316.

Conn. An act for laying and collecting a duty on the exportation of timber, etc.—Conn. Colonial Laws, 1668, p. 288. An act for laying and collecting

and Resolves of the First Continental Congress, Octo-

a duty on goods and merchandise brought in for sale by persons not inhabitants of this colony.—Conn. Acts and Laws 1768, p. 885. An act to enable the governor to lay an embargo, and for rendering the same when laid effectual. Ib. 1776, p. 489. An act for levying and collecting duties on the importation of certain articles, and for appropriating the same.—Laws of Conn. 1784, p. 309.

N. Y. An act for laying a duty on all empty casks imported into this colony.—Colonial Laws N. Y. Vol. 1, p. 1022 (1719). An act to lay a duty of tonnage on the vessels and for the time therein mentioned. Ib. Vol. 2, p. 848 (1784). An act to prevent the exportation of provisions, gunpowder, arms, all kinds of ammunition, warlike stores and white pine inch boards. Ib. Vol. 3, p. 569 (1746). An act to prevent the exportation of provisions, naval and warlike stores, etc. Ib. p. 1121 (1755). An act to prevent the exportation of flour, meal and grain out of this state. Ib. Vol. 10, p. 11 (1778). Repealed, Ib. p. 196. An act imposing duties on the importation of certain goods, wares and merchandise.—Laws N. Y., p. 11 (1784).

N J. An act to restrain the exportation of pitch, tar, turpentine, and other naval stores, from the State of New Jersey.—N. J. Acts, Sept. 1777, p. 98. An act to prevent persons from passing through the state without proper passports. Ib. 1779, p. 88. An act to continue an act, entitled, an act to prohibit the exportation of provisions from the state of New Jersey. —N. J. Acts, December 1779, p. 47.

Pa. An act for granting an impost upon wines, rum, beere, ale, cider, etc., imported, retailed and

ber 14, 1774, in which Congress agrees to the operation

sold in this province and territories.—Penn. Stat. at L., Vol. 2, p. 105 (1700). An act to prevent the exportation of bread and flour not merchantable. Ib. Vol. 4, p. 248 (1733). An act to prohibit the exportation of provisions from the state of Pennsylvania for a limited time. Ib. Vol. 9, p. 272 (1778). An act for laying an embargo on the exportation of provisions from this state by sea for a limited time. Ib. Vol. 10, p. 43 (1780). An act to permit the exportation of flour of wheat from this state by sea under certain limitations and restrictions. Ib. p. 248 (1780). An act for an impost on goods, wares and merchandise imported into this state. Ib. p. 252 (1780). An act to prevent the exportation of bread and flour not merchantable, and for repealing at a certain time all the laws heretofore made for that purpose. Ib. p. 288 (1781). An act for raising an impost on goods, wares and merchandise imported or brought into this state by land. Ib. Vol. 11, p. 8 (1782). An act to encourage and protect the manufacturers of this state by laying additional duties on the importation of certain manufactures which interfere with them. Ib. Vol. 12, p. 99 (1785). An act to lay a duty on foreign barley and malt imported into this state. Ib. Vol. 13, p. 57 (1788).

Del. An act to prohibit the exportation of provisions from this state beyond the seas, for a limited time.—Del. Laws, Oct. 1778, p. 8. Same act passed December 25, 1779, and June 1780. An act to establish certain free ports within the Delaware state, and for the encouragement of commerce.—Del. Laws, Feb. 1786, p. 4.

Md. An act to prevent the exportation of flour, staves and shingles, not merchantable, from the

of such "acts of the British parliament, as are bona fide,

town of Baltimore, in Baltimore County, and to regulate the weight of hay, and measure of grain, salt, flaxseed and fire-wood, within the said town.—Stat. at L. (1768). An act to prohibit, for a limited time, the exportation of wheat, flour, rye, Indian corn, rice, bread, beef, pork, bacon, live stock, and other victual. Ib. (1778). An act to prevent the exportation of bread and flour not merchantable and for other purposes. Ib. (1781). An act to repeal certain duties on tobacco and pig iron). Ib. (1782). An act to impose duties on certain enumerated articles imported into and exported out of this state, and on all goods, wares and merchandise, imported into this state. Ib. (1784).

Va. An act against transportation of cowes and female cattle.—Hening's Stat. at L., Vol. 1, p. 218 (1631). Any person may export to New England or other neighboring colony the 7th head of neat cattle and no more under penalty double value. Ib. p. 227 (1633). An act prohibiting the importation of unnecessary commodities. Ib. Vol. 2, p. 18 (1660). Tobaccos of Mariland groweth free from duties. Ib. p. 259 (1660). An act against exportation of corns. Ib. p. 261 (1667). Against importation of horses and mares. Ib. p. 271 (1669). An act permitting the exportation of wool, hides and iron. Ib. p. 287 (1671). An act prohibiting the importation of tobaccoes into this colony. Ib. p. 445 (1679) An act forbidding Maryland vessels trading into this colony without makeing due entry. Ib. 446 (1679). An act prohibiting the exportation of any iron, wool, woolfells, skins, hides or leather. Ib. p. 498 (1682). An act against importing tobacco from Carolina, and other parts without the Capes of Virginia. Ib. p. 258 (1704). An act for laying an imposition upon liquors and slaves. Ib.

restrained to the regulation of our external commerce,

Vol. 8, p. 229 (1705). An act for laying a duty on liquors. Ib. Vol. 4, p. 148 (1726). An act for prohibiting the exportation of grain in time of scarcity. Ib. p. 221 (1727). An act for regulating the size and dimensions of staves, heading, and shingles, intended for exportation to Madera, and the West Indies. Ib. Vol. 6, p. 238 (1782). An act for laying an additional duty on rum, and other distilled spirits, not being of the produce of his majesty's sugar islands. Ib. Vol. 6, p. 471 (1755). An act to empower the Governour and Council to lay an embargo for a limited time. Ib. Vol. 9, p. 580 (1778). An act for laying an embargo on salt, and for other purposes. Ib. Vol. 10, p. 149 (1779). An act for farther continuing an act entitled an act to empower the governour and council to lay an embargo for a limited time. Ib. p. 428 (1781). An act to repeal the act, intituled, An act to enable the congress of the United States to levy a duty on certain goods and merchandises, and also on all prizes. Ib. Vol. 11, p. 171 (1782). An act to prevent the importation of convicts into this commonwealth. Ib. Vol. 12, p. 668 (1788).

N. C. An act to prevent the exportation of provisions and live stock from this province to the French or neutral ports.—N. C. Revised Acts 1773, p. 174 (1766). An act to prevent the inhabitants of South Carolina driving their stocks of cattle from thence to range and feed in this province, and other purposes. Ib. p. 358 (1766). An act for laying certain duties therein mentioned on all foreign merchandise imported into this state, in aid of the public finances, and directing the mode of collecting the same. —Iredel, Laws of N. C. 1791, p. 478 (1784). An act for the regulation of commerce. Ib. p. 549. (1785).

for the purpose of securing the commercial advantages

An act to prevent the exportation of raw hides, pieces of hides of neat cattle, and calf-skins, and also of beaver, racoon and fox furs. Ib. p. 668 (1789). An act for cutting a navigable canal from the waters of Pasquetonk river, in this state, to the waters of Elizabeth river, in the state of Virgina. Ib. p. 685 (1790). The state of Virginia passed a companion act in which both states agreed "that no restriction, duty or impost, shall be laid on any commodity which is the growth, produce or manufacture" of the respective states brought through the canal. An act for the regulation of commerce.—N. C. Laws, Nov. 1785, p. 6. An act to prevent the exportation of raw hides, pieces of hides of neat cattle, and calf-skins, and also of beaver, racoon and fox furs. Ib. Nov. 1789, p. 7.

S. C. An act to prevent horses being brought by land from the northern settlements into this government. March 1700, No. 177. An act for prohibiting and preventing the exportation of corn, pease, and small rice, from this province, for the term therein mentioned—S. C. Acts, Oct. 1752, p. 715. An act to prevent the exportation of grain and other provisions, and arms, ammunition, strouds, duffils, and plains, from the province of South Carolina, for the term therein mentioned. Ib. June 1760, p. 12. An act for imposing and continuing an additional duty on all wines, rum, biscuit and flour, to be hereafter imported, during the term herein mentioned; and for applying part of the said duties to the payment of South Carolina regiment. Ib. June 1761, p. 5. An act for levying and collecting certain duties and imposts therein mentioned, in aid of the public revenues; and for repealing an act, entitled "An act for levying and collecting certain duties and imposts therein mentioned in aid of the public

of the whole empire to the mother country, and the commercial benefits of its respective members; . . ." H. D. 898, 8.

Among the causes given for taking up arms, July 6, 1775, we cite the following:

> ". . . . for interdicting all commerce to the capital of another [colony]; . . . (H. D. 898, 12)
>
> * * * * *
>
> ". . . . we have even proceeded to break off our commercial intercourse with our fellow-subjects, as the last peaceable admonition, . . ." (H. D. 898, 13)

---

revenue," passed the 13th of August, 1783.—S. C. Public Laws 1682-1790, p. 340 (1783). An act to impose certain duties on goods to be imported into this state.—S. C. Laws, 1785, p. 2. An act for investing the United States in Congress assembled, with a power to levy, for the use of the United States, certain duties upon goods imported into this state from any foreign port, island or plantation.—S. C. Laws, 1784, p. 19. An act to authorize the United States in Congress assembled, to regulate trade from the British West Indies.—S. C. Laws 1784, p. 21.

Ga. An act to prohibit for a certain time the exportation of Indian corn.—Colonial Records of Georgia 1768-1778, Vol. 19, p. 140 (1770). An act to oblige masters of vessels and other transient persons importing negroes or other slaves, goods, wares, and merchandise to pay tax for the same, etc. Ib. p. 489 (1778).

It will be noted that the Declaration of Independence contains as one of the reasons for the action of the colonies the following:

> ". . . . For cutting off our Trade with all parts of the world. . ." (H. D. 898, 24)

Further:

> ". . . . that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. . . . (H. D. 898, 25)

Commerce Under the Confederation

The following provisions of the Articles of Confederation concern this subject.

> ". . . . the people of each state shall have free ingress and egress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively: *Provided,* that such restrictions shall not extend so far as to prevent the removal of property imported into any state to any other state of which the owner is an inhabitant; . . . ." Article IV.

"No state shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States in congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by congress to the courts of France and Spain." Article VI, Sec. 3.

". . . . that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; . . ." Article IX, Sec. 1.

The first draft of the Articles of Confederation (July 12, 1777, Vol. V, Journals Continental Congress, 547) provides in Article VII that the inhabitants of each colony shall henceforth always have the same rights, liberties, privileges, etc. in trade, navigation and commerce in any other colony which the natives of such colony then had. Article VIII permitted each colony to assess such imposts or duties as it thought proper, provided the same did not interfere with any treaties *hereafter* entered into by the United States. After consideration by the committee of the whole a second printed form was presented in which the provisions as to the rights of the inhabitants of one colony in another colony are omitted, the provision as to the assessment of imposts or duties remaining the same (Ib. 676). The

final draft adopted November 15, 1777 (Vol. IX, J. C. C. 907) contains Article IV as finally adopted except an unimportant change. The provision as to imposts or duties (Article VI) was changed so as to restrict the states only with reference to the treaties *already* proposed by Congress to the courts of France and Spain (Ib. 911).

Thus we see that from the beginning the states were zealous to protect their complete rights over all commerce crossing their borders. Goods in interstate commerce were subject to the same duties, impositions and restrictions as goods manufactured in the state of destination. If the laws of the state of destination prohibited the manufactrue or sale in that state of certain goods, then no such goods imported from another state could be sold in the first state because the imported goods were subject to the state laws upon their arrival and delivery in the second state. Under the Act Congress attempts, by divesting interstate shipments of prison-made goods of their interstate character upon their arrival and delivery in the state of destination, to make them immediately subject to state laws as fully as if manufactured in that state just as was the case of interstate shipments under the Confederation.

The ratification by the states of the articles was not prompt. On June 25, 1778 Congress took into consideration the representation from New Jersey containing the following:

"2. By the sixth and ninth articles, the regulation of trade seems to be committed to the several states within their separate jurisdictions, in such a degree as may involve many difficulties and embarrassments, and be attended with injustice to some states in the union: we are of opinion, that the sole and exclusive power of regulating the trade of the United States wth foreign nations, ought to be clearly vested in the Congress, and that the revenue arising from all duties and customs imposed thereon, ought to be appropriated to the building, equipping and manning a navy for the protection of the trade and defence of the coasts, and to such other public and general purposes as to the Congress shall seem proper, and for the common benefit of the states. This principle appears to us to be just, and it may be added, that a great security will by this means be derived to the union from the establishment of a common and mutual interest." (Vol. XI, J. C. C. 648)

The next reference to interstate commerce which we have been able to find is that of Mr. Hamilton in a letter to James Duane in 1780 in which the former points out the fundamental defect of the existing government as a want of power in Congress, saying that

". . . . All imposts upon commerce ought to be laid by Congress, and appropriated to their use; . . . ."

(Curtis' Constitutional History of the United States (1889), Vol. 1, 287-8. Footnote).

Discussing a proposed convention he said that delegates to attend it should provide for extending the powers of Congress to include, among other things, that "of regulating trade, determining with what countries it shall be carried on; . . . . making alliances offensive and defensive, and treaties of commerce, etc. . . ." (Ib. 289)

On February 3, 1781, Mr. Witherspoon introduced a resolution (which was negatived):

> "That it is indispensably necessary that the United States in Congress assembled, should be vested with a right of superintending the commercial regulations of every State, that none may take place that shall be partial or contrary to the common interest; and that they should be vested with the exclusive right of laying duties upon all imported articles, no restriction to be valid, and no such duty to be laid, but wth the consent of nine states. . . ." (Vol. XIX, J. C. C. 110)

On the same day Congress recommended to the states the passage of a law vesting the power in Congress to levy a five per cent ad valorem duty on imports of foreign growth and manufacture, for the purpose of discharging the war debt (Vol. XIX, J. C. C. 112-13).

This recommendation was not accepted by all the states. In 1788 Congress undertook to secure the adoption by the states of a substitute plan for imposing a five per cent. tax. The condition of the several states is set out in an interesting fashion by Mr. Madison in a note which shows the anxiety of several states to protect themselves against the taxes imposed on them by their neighbors, and *vice versa*, the determination of commercial states not to give up any of the privileges of exacting taxes on trade passing through their ports.

Mr. Madison said that New Hampshire was in favor of the five per cent. tax for stated reasons among which was

> "to secure her trade against separate taxation from the states thro' which it is carried on. . . ." (Vol. XXV, J. C. C. 913)

Rhode Island was against the p'an

> "as tending to deprive her of the advantages afforded by her situation of taxing the commerce of the contiguous States. . . ." (Ib. 914)

Connecticut was in favor of the plan

> "as tending to protect her commerce from separate taxation by N. York & Rhode Island; . . ." (Ib.)

New Jersey was in favor of the plan

> "to guard her commerce agst. the separate taxation of Pennsylvania and N. Y. . . . ." (Ib.)

Pennsylvania:

> ". . . . As far as a general impost on trade would restrain her from taxing the trade of N. Jersey, it would be against her interest. . . ." (Ib.)

While Virginia favored the plan generally yet it would

> "deprive her of the occasion of taxing the commerce of N. Carolina. . . ." (Ib. 914-15)

North Carolina favored the plan so as

> "to guard her trade from separate taxation by Virginia and S. Carolina. . . ." (Ib. 915)

South Carolina:

> ". . . . As restraining her power over the commerce of N. Carolina, a general revenue is opposed by her interests. . . ." (Ib.)

Nor was the plan of April 18, 1783, for raising revenue adopted by all the States. The letter prepared by

Messrs. Gerry, Jefferson and others to accompany the resolution as recommended to the states, contained the statement that

> ". . . The situation of Commerce at this time claims the attention of the several states, and few objects of greater importance can present themselves to their notice. . . ." (Vol. XXVI, J. C. C. 321)

It is apparent that no state was free from conflict with other states on this question.

The first suggestion of regulating the trade of the states with each other, so far as we have been able to find, is contained in a report of the committee headed by James Monroe recommending an amendment of the ninth article so as to read as follows:

> " 'The United States in Congress assembled shall have the sole and exclusive right and power of determinng on peace and war, except in the cases mentioned in the sixth Article, of sending and receiving Ambassadors, entering into treaties and alliances, of regulating the trade of the States, as well with foreign Nations, as with each other, and of laying such imposts and duties upon imports and exports, as may be necessary for the purpose; provided that the Citizens of the States shall in no instance be subjected to pay higher imposts and duties, than those imposed on the subjects of foreign

powers; provided also that the Legislative powers of the several States shall not be restrained from prohibiting the importation or exportation of any species of goods or commodities whatsoever; provided also that all such duties as may be imposed, shall be collected under the authority and accrue to the use of the State in which the same shall be payable. . . .'" (Vol. XXVIII, J. C. C. 201)

Apparently there was no hope that all the states were to approve the recommendation of April 18, 1788; so Mr. Madison, who had become a member of the House of Delegates of Virginia, prepared on January 21, 1786, a resolution proposing a joint meeting of commissioners from the several states to be held at Annapolis "to consider and recommend a federal plan for regulating commerce."

The convention met on September 11, 1786, and lasted four days. It was attended by delegates from five State. Those attending

> "did not conceive it advisable to proceed on the business of their mission, under the circumstance of so partial and defective a representation." (House Document 398, 69th Congress, 41)

In their report to the legislatures of the states the commissioners suggested an extension of the powers of their representatives "to other objects than those of commerce"; that in the course of the reflections of the commissioners on the subject they had been induced to think

"that the power of regulating trade is of such comprehensive extent, and will enter so far into the general system of the federal government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the federal system." (Ib. 42).

The Convention of 1787—
Development of the Commerce Clause

Article I, Section 8, Clause 8 empowers Congress "to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

There is no reference to interstate commerce in Mr. Randolph's resolution introduced on May 29,1787 (The Records of the Federal Convention—Farrand, Vol. I, 21). The subject, however, is doubtless intended to be covered by the following part of resolution No. 6:

" . . . that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation and moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; . . ." (Ib. 21)

Mr. Patterson from New Jersey on June 9 stated that what was expected of the convention, among other things, was the regulation of commerce (Ib. 188).

On June 18 is set out in the Journal the state of the resolutions submitted by Mr. Randolph and as agreed to in committee of the whole. There is no change shown in the next preceding excerpt from resolution numbered 6 (Ib. 229).

On June 15 Mr. Patterson proposed a plan which was referred to the committee of the whole and which extended the powers of Congress "to pass acts for the regulation of trade and commerce as well with foreign nations as with each other: . . ." (Ib. 248).

On June 18 Mr. Madison stated:

> ". . . The States have constantly shewn a disposition rather to regain the powers delegated by them than to part with more, or to give effect to what they had parted with. . . ." (Ib. 284).

After debating the same the committee reported (June 19) that they did not agree to the propositions offered by Mr. Patterson and reported the recommendations offered by Mr. Randolph (Ib. 313).

On June 25 Mr. Wilson referred to the fact that the convention had

> "unanimously agreed to establish a general government—That the powers of peace, war, treaties, coinage and regulating of *commerce,* ought to reside in that government. . . ." (Ib. 418).

On June 29 Mr. Patterson quoted Mr. Gorham as having said that New Jersey should not oppose a plan

> "as she at present pays the Taxes of Penn. and N. York, from which she would be relieved." (Ib. 479)

On June 30 Mr. Ellsworth said:

> " . . . Suppose that in pursuance of some commercial treaty or arrangement, three or four free ports and no more were to be established would not combinations be formed in favor of Boston, Philada. and some port in Chesapeak? . . ." (Ib. 484-5)

On June 30 (Mr. Madison's Notes) the discussions turned on the conflicts between the larger and the smaller states on commerce; it being said by Mr. Bedford (Delaware) that if the larger states effected a combination, the smaller states would be ruined; that the smaller states would unite in commercial regulations but that if "policy should require free ports, they would be found in Boston, Philadelphia and Alexandria" (Ib. 491-2, 496).

On July 5 Mr. Madison said:

> " . . . As little could he suspect that the people of N. Jersey notwithstandng the decided tone of the gentlemen from that State, would choose rather to stand on their own legs, and bid defiance

> to events, than to acquiesce under an establishment founded on principles the justice of which they could not dispute, and absolutely necessary to redeem them from the exactions levied on them by the commerce of the neighbouring States. . . ." (Ib. 528).

Mr. Yates in his notes quotes Mr. Madison who was discussing the proposed compromise of the committee which provided equal suffrage for the states and permitted the lower branch to originate money bills, etc., as saying on July 5:

> " . . . The power of regulating trade, imposts, treaties, etc. are more essential to the community than raising money, and no provision is made for those in the report—" (Ib. 535).

We find that the committee of detail used a number of drafts, most of which provide for regulation of trade among the states (Farrand, Vol. II, 135, 143, 157, 158, 167 and 181), the last cited being the official report of the committee presented on August 6 and containing the following as Article VII, Section 1, Clause 2:

> "To regulate commerce with foreign nations, and among the several States;" (Ib. 181).

In discussing the important question of duties and imposts, Mr. Sherman of Rhode Island said that

> "... The oppression of the uncommercial States was guarded agst. by the power to regulate trade between the States. . . ." (Ib. 308).

On August 18 certain additional proposed powers containing the following were submitted to the convention and referred to the committee of detail:

> "To regulate affairs with the Indians as well within as without the limits of the United States" (Ib 321).

The committee of detail recommended that the commerce clause as quoted above from p. 181 should be extended by adding thereto the following:

> "'and with Indians, within the Limits of any State, not subject to the laws thereof.'" (Ib. 367)

The committee of eleven recommended on September 4 that there be added to Article VII, Section 1, Clause 2 the following:

> "and with the Indian tribes" (Ib. 497)

which was agreed to (Ib. 499).

There was referred to the committee on style (September 10) the draft of the Constitution as adopted by the convention which contained the following:

> "To regulate commerce with foreign nations, and among the several States; and with the Indian tribes." (Ib. 569)

The committee reported on September 12, having changed the commerce clause to the following:

> "To regulate commerce with foreign nations, among the several states, and with the Indian tribes" (Ib. 595)

as it is today.

Views Expressed in the Convention—Public Writings —The Federalist

It will be recalled that there were six commercial states and that the non-commercial states were undertaking to protect themselves against the impositions then being practiced by the former. In order to show the lack of intention on the part of its framers, and consequently on the part of the people ratifying the Constitution, to impose on Congress any semblance of power to prohibit interstate trade, we quote the following views expressed in the convention at Philadelphia, in the several state conventions, in The Federalist and in public writings.

From the Madison papers (H. D. 398, 69th Congress, 1st session) we take the following from the debates in the convention:

July 28—On the question of referring the proposed plan to the separate legislatures of the several states for ratification, Mr. Gorham said:

> " . . . The present advantage which N. York seems to be so much attached to, of taxing her neighbours by the *regulation* of her trade, makes it very probable, that she will be of the number. It would therefore deserve serious consideration whether provision ought not to be made for giving effect to the System without waiting for the unanimous concurrence of the States." (Ib. 486)

On the question of taxing exports, Mr. Langdon (August 21) stated that the non-exporting states would be subject to be taxed by the states exporting their produce.

> " . . . This could not be admitted. It seems to be feared that the Northern States will oppress the trade of the Southn. This may be guarded agst. by requiring the concurrence of 2-3 or 3-4 of the legislature in such cases. (Ib. 584)

> "Mr. Elseworth. It is best as it stands. The power of regulating trade between the States will protect them agst each other. . . ." (Ib. 584).

August 25, 1787 (In Convention):

"Mr. Carroll and Mr. L. Martin expressed their apprehensions, and the probable apprehensions of their constituents, that under the power of *regulating* trade the General Legislature, might favor the ports of particular States, by requiring vessels destined to or from other States to enter and clear thereat, as vessels belonging or bound to Baltimore, to enter and clear at Norfolk, etc. . . ." (Ib. 618-19).

August 25 (discussion of the two-thirds vote on the Navigation Act):

"Mr. Madison went into a pretty full view of the subject. He observed that the disadvantage to the S. States from a navigation act, lay chiefly in a . . . removal of the existing and injurious retaliations among the States on each other. . . ." (Ib. 686).

Mr. Bedford said (June 30):

" . . . 'The larger states', you say, 'all differ in productions and commerce; and experience shows that, instead of combinations, they would be rivals, and counteract the views of one another.' This, I repeat, is language calculated only to amuse us. Yes, sir, the larger states will be rivals, but not against each other—they will be rivals against *the rest of the states*. . . ." (Taken from Mr. Yates'

minutes as contained in Elliot's Debates, 2nd Edition, Vol. 1, 472).

Mr. Madison (July 5):

> " . . . The power of regulating trade, imposts, treaties, etc., are more essential to the community than raising money. . . ." (Ib. 479).

In Washington's letter to Congress (September 12) we find the following:

> "The friends of our country have long seen and desired that the power of making war, peace, and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities should be fully and effectually vested in the general government of the Union: . . ." (H. D. 898, 1008)

In a letter of Mr. Randolph to the Speaker of the House of Delegates (October 10) it is noted that one of the objects proposed by the Constitution was that the latter "should cherish trade, and promote the prosperity of the states under its care" (Elliot's Debates, 2nd Edition, Vol. 1, 482).

He said further:

> " . . . I cannot presume that, through all time, in the daily mixture of American citizens with each

other, in the conflicts for commercial advantages, in the discontents which the neighborhood of territory has been seen to engender in other quarters of the globe, and in the efforts of faction and intrigue,—thirteen distinct communities, under no effective superintending control, (as the United States confessedly now are, notwithstanding the bold terms of the Confederation,) will avoid a hatred to each other deep and deadly." (Ib. 484)

Mr. Sherman and Mr. Ellsworth made a report to the Governor of Connecticut (September 26) in which they said:

"The restraint on the legislatures of the several states respecting emitting bills of credit, making any thing but money a tender in payment of debts, or impairing the obligation of contracts by *ex post facto* laws, was thought necessary as a security to commerce, in which the interest of foreigners, as well as of the citizens of different states, may be affected." (Ib. 492)

Mr. Jay in an address to the people of New York said that the old Confederation had become so feeble that in all probability it would not survive a violent shock.

" . . . Then, every state would be a little nation, jealous of its neighbors, and anxious to strengthen itself, by foreign alliances, against its former

friends. Then farewell to fraternal affection, unsuspecting intercourse, and mutual participation in commerce, navigation, and citizenship. . . ." (Ib. 502).

In the state conventions we find prevailing the same desire for freedom of commerce from state restraints. Mr. Dawes in the Massachusetts convention (January 21, 1788) said:

"As to *commerce,* it is well known that the different states now pursue different systems of duties in regard to each other. By this, and for want of general laws of prohibition through the Union, we have not secured even our own domestic traffic that passes from state to state. . . ." (Ib. Vol. 2, 57-8).

* * * * *

" . . . If we wish to encourage our own manufactures, to preserve our own commerce, to raise the value of our own lands, we must give Congress the powers in question." (Ib. 59)

Mr. Bowdoin (January 28) :

"But if we attend to our trade, as it is at present, we shall find that the miserable state of it is owing to a like want of power in Congress. . . . If it be asked, How are these evils, and others that might be mentioned, to be remedied? the answer is short—

By giving Congress adequate and proper power . . ." (Ib. 88).

Mr. Adams (January 80):

"Sir, there are many parts of it I esteem as highly valuable, particularly the article which empowers Congress to regulate commerce, to form treaties, etc. For want of this power in our national head, our friends are grieved, and our enemies insult us. . . ." (Ib. 124).

Mr. Bowdoin (February 1) said:

". . . The well-being of trade depends on a proper regulation of it; on the success of trade depends wealth; on wealth, the value of lands; the strength, the welfare, and happiness of a country, upon the numbers, the ease, and independence of its yeomanry. . . ." (Ib. 180).

Massachusetts proposed several amendments, among which is the following:

"Fifthly, that Congress erect no Company of Merchants with exclusive advantages of commerce." (H. D. 898, 1019)

The foregoing amendment was likewise proposed by New Hampshire (Ib. 1025); New York (Ib. 1040);

North Carolina (Ib. 1051) and Rhode Island (Ib. 1059).

In the Connecticut convention Mr. Ellsworth (January 7, 1788, referring to the power of Congress to tax imports, said:

> " . . . Another weighty reason in favour of this branch of the revenue is, if we do not give it to congress, the individual states will have it. It will give some states an opportunity of oppressing others, and destroy all harmony between them. If we would have the states friendly to each other, let us take away this bone of contention, and place it, as it ought in justice to be placed, in the hands of the general government." (Elliot's Debates, 2nd Edition, Vol. 2, 198)

Mr. Livingston (New York June 17, 1788) "urged the common consent of America as a proof of the necessity of adding the power of regulating commerce to those Congress already possessed, which, he said, not only included those of forming laws, but of deciding upon those laws, and carrying them into effect; that this power could never be trusted to the individual states, whose interests might, in many instances, clash with that of the Union. . . ." (Ib. 214-15).

Mr. Clinton (June 21) said:

" . . . Each state is but a narrow district, compared with the United States. The situation of its commerce, its agriculture, and the system of its resources will be proportionably more uniform and simple. . . ." (Ib. 261).

Mr. Livingston (July 1):

" . . . The power of regulating commerce we possess; but the gentlemen admit that we improperly possess it. What, then, is taken away? . . " (Ib. 384).

Mr. Randolph (Virginia June 16 (6), 1788) said:

" . . . Consider the commercial regulations between us and Maryland. Is it not known to gentlemen that the states have been making reprisals on each other—to obviate a repetition of which, in some degree, these regulations have been made? Can we not see from this circumstance, the jealousy, rivalship, and hatred that would subsist between them, in case this state was out of the Union. . . . Congress, sir, ought to be fully vested with power to . . . promote harmony and public tranquility among the states." (Ib. Vol. 3, 82)

Mr. Randolph (June 10):

" . . . The different confederacies will be rivals in power and commerce, and therefore will soon be implacable enemies of one another. . . ." (Ib. 198).

Mr. Madison (June 11):

" . . . All agree that the general government ought to have power for the regulation of commerce . . . There are regulations in different states which are unfavorable to the inhabitants of other states, and which militate against the revenue. New York levies money from New Jersey by her imposts. In New Jersey, instead of cooperating with New York, the legislature favors violations on her regulations. This will not be the case when uniform regulations will be made." (Ib. 260)

Mr. Grayson (June 11) in opposing the ratification said that before the meeting of the convention in Philadelphia there was only one object in view: To give the general government the five percentum impost, and the regulation of trade (Ib. 277).

Mr. Pendleton (June 12) said:

" . . . I wish commerce to be fully protected and encouraged, that the people may have an opportunity of disposing of their crops at market, and

of procuring such supplies as they may be in want of. . . ." (Ib. 295).

Mr. Davie (North Carolina July 24, 1788) stating the general objects of the Union included the following:

"to promote the commerce, agriculture, and manufacture, of America. These objects are requisite to make us a safe and happy people, and they cannot be attained without a firm and efficient system of union." (Ib. Vol. 4, 17)

Mr. Pinckney (South Carolina, January 16, 1788) said:

" . . . The states, too, individually attempted, by navigation acts and other commercial provisions, to remedy the evil. These, instead of correcting, served but to increase it; their regulations interfered not only with each other, but, in almost every instance, with treaties existing under the authority of the Union. . . ." (Ib. 253-4).

Mr. Pinckney (May 14) referred to the hope that by the adoption of the Constitution we would be resorted to

"those blessings of commerce and mutual confidence which have been so long removed and impaired. . . ." (Ib. 330).

The Federalist

Examination of The Federalist shows that this question of freedom of commerce among the states was expected to result as a matter of course from the ratification of the Constitution. We quote the following excerpts:

Referring to the probability of war among the colonies (Mr. Hamilton—No. 7) if the Constitution were not ratified:

> "The competitions of commerce would be another fruitful source of contention. The States less favorably circumstanced would be desirous of escaping from the disadvantages of local situation, and of sharing in the advantages of their more fortunate neighbors. Each State, or separate confederacy, would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent. . . ." [The Federalist (Edition of Central Law Journal Co., 1917) Vol. 1. 45].

No. 11—Mr. Hamilton:

> "An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of com-

merce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope, from the diversity in the productions of different States. When the staple of one fails from a bad harvest or unproductive crop, it can call to its aid the staple of another. The variety, not less than the value, of products for exportation contributes to the activity of foreign commerce . . ." (Ib. 76).

No. 12—Mr. Hamilton, referring to the riches of the dominions of the Emperor of Germany, said:

" . . . And yet, from the want of the fostering influence of commerce, that monarch can boast but slender revenues. . . ." (Ib. 80).

No. 22—Mr. Hamilton:

"The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy. . . ." (Ib. 142).

No. 42—Mr. Hamilton:

"The defect of power in the existing Confederacy to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience. To the proofs and remarks which former papers have brought into view on this subject, it may be added that without this supplemental provision, the great and essential power of regulating foreign commerce would have been incomplete and ineffectual. A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former. . . ." (Ib. 288-9).

No. 45—Mr. Madison:

"If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; but that seems to be an addition which

few oppose, and from which no apprehensions are entertained. . . ." (Ib. 319).

As we view the conflicts among the states over their trade and commerce prior to 1787 and the almost entire unanimity with which the convention adopted the interstate commerce clause, we cannot avoid the conclusion that the framers of the Constitution regarded the provision as essential to the freedom of interstate commerce from restraint. Yet it is unreasonable to suppose that the states gave up their power of taxation over imports and exports and of embargo, in order that these powers might be imposed on a national government. Indeed, an examination of the debates in the several state conventions reveals that the principal objections to the ratification of the Constitution were that a strong central government was being built up which would deprive the states of more power than was intended by the people. As a result of these fears several conventions proposed amendments to the Constitution which resulted in the immediate adoption of the first ten amendments.

What would Patrick Henry have said in the Virginia convention if anyone had suggested that Congress had the power to pass a law forbidding the planters of Virginia from shipping their tobacco beyond their borders? Indeed, if a thought had been given to this possiblity the Constitution never would have been written. Certainly, the people would not have ratified it.

Provision is contained in this instrument for its amendment by the people. It is solely by following its terms that this government has endured. If the Constitution becomes unstable, no rights of property are fixed and no principles of government remain.

> " . . . If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it a mere reflex of the popular opinion or passion of the day. . . ."

Dred Scott v. Sandford, 19 How. 393. 426 (15 L. ed. 691, 709).

In Lehigh Valley Railroad Company v. Pennsylvania, 145 U. S. 192 (36 L. ed. 672), involving a tax on railroad transportation, the Court said:

"The conflict between the commercial regulations of the several states was destructive to their harmony and fatal to their commercial interests abroad, and this was the mischief intended to be obviated by the grant to the Congress of the power to regulate commerce with foreign nations and among the States. . . ." 200 (675)

The Minnesota Rate Cases, 230 U. S. 352 (57 L. ed. 1511):

Referring to the power of Congress to regulate commerce among the several states as being complete in itself, the court said:

". . . The conviction of its necessity sprang from the disastrous experiences under the Confederation when the States vied in discriminatory measures against each other. In order to end these evils, the grant in the Constitution conferred upon Congress an authority at all times adequate to secure the freedom of interstate commercial intercourse from state control and to provide effective regulation of that intercourse as the national interest may demand. . . ." 398 (1540-1).

In *Pollock v. Farmers' Loan and Trust Company*, 157 U. S. 429 (39 L. ed. 759), the Court said:

"We must remember that the fifty-five members of the constitutional convention were men of

> great sagacity, fully conversant with governmental problems, deeply conscious of the nature of their task, and profoundly convinced that they were laying the foundations of a vast future empire. . . ." 338 (811).

Is it possible to believe that these fifty-five men, with all their knowledge of their country's problems arising principally from the subjection of commerce to vexatious local regulations, intended that Congress should exercise its delegated power to regulate commerce by vesting the states with the power to subject commerce crossing their borders from other states "to the same duties, impositions and restrictions as the inhabitants thereof" were subjected, as was provided in Article IV of the Confederation?

Congress Cannot Delegate Its Powers

An attempt by Congress to divest itself of any powers is as contrary to the Constitution as is the usurpation by Congress of a power not granted under the Constitution. By attempting to delegate power to the states to share in the regulation of prison-made goods, by passing an act which attempts to divest an interstate shipment of such goods of its interstate character at an earlier time than interstate shipments of other goods become divested of their interstate character, Congress attempts partially to divest itself of its exclusive character to regulate interstate commerce. By such action each state would secure earlier control of prison-made

goods as a result of their being released from the protection afforded interstate shipments and thus they would become subject to state laws upon their arrival and delivery in the state of destination. It is claimed that this is merely an early recognition of states' rights by Congress. Such a claim has no support. As a matter of fact, Congress accepts the shipment as a part of interstate commerce and exercises its exclusive power to regulate the shipment during a part of its journey, and then attempts to delegate to the state the power to regulate during the remainder of the journey by abandoning control of the shipment while in transit. —that is, before sale. This cannot be done. The interstate jurisdiction attached to the shipment must continue throughout.

It is recognized that under the Hawes-Cooper Act states can prohibit the sale of prison-made goods within their borders, and the several defendant states have enacted such laws (Bill Sec. 12) to the extent that such states are permitted, to prohibit interstate commerce in prison-made goods within their borders. This is an attempted delegation by Congress to the states. Congress has no authority to delegate any power to any state and no state has the authority to exercise such power over interstate commerce, even if Congress attempts to delegate it. Such an Act is unconstitutional both as an attempted delegation which Congress of itself undertakes to return to the states and as an attempted exercise by the states of a power prohibited to them.

No one has before ventured the assertion that the framers of the Constitution intended to authorize Congress, in the exercise of a limited and exclusive power merely to regulate commerce, to withdraw from interstate shipment the protection of its interstate character whenever Congress pleased, and to make that shipment subject to local state laws, control and inhibitions, which might prohibit such commerce and which had been found to be so destructive thereof. Under the plan of the framers the states impliedly agreed not to exercise their power to prohibit such commerce, and they certainly never granted Congress the right to prohibit it. The purpose was to free it from restraint, promote, foster and encourage it.

It is beyond the power of Congress to delegate its power to the states. Article I, Section 1 of the Constitution provides that "all legislative powers herein claimed shall be vested in the Congress of the United States . . ."

The legislative power to regulate commerce can be exercised only by Congress. It cannot delegate to the various states power to legislate on interstate commerce. It cannot do by indirection what it cannot do directly. It cannot by indirection confer on any state power to legislate on interstate commerce by arbitrarily declaring as to certain shipments which have come within the protection of interstate commerce, that they are divested of their interstate character at a certain time, and thereby empower the states to enact legislation controll-

ing them; while holding that other goods retain this character for a longer period. Congress cannot delegate power to a state to control a part of interstate commerce, and retain control of the rest. It cannot authorize state control of some form of that commerce for a part of the time and yet exercise exclusive control over the balance for all the time. It cannot surrender control to the states of prison-made shirts moving in interstate commerce any earlier than it surrenders to their control shipments of steel and iron. Congress has no power, at its whim, to withdraw from an interstate shipment the protection of its interstate character, when that character has once attached and been recognized by Congress; and thereby subject that shipment, while still moving in the recognized channels of interstate commerce, to the regulations or prohibitions of any state.

> ". . . it may be admitted, that Congress cannot give a right to a state, in virtue of its own powers. . . ." Gibbons v. Ogden, 9 Wheat. 1, 202 (6 L. ed. 23, 71).

> ". . . Nor can Congress transfer legislative powers to a state nor sanction a state law in violation of the Constitution; and if it can adopt a state law as its own, it must be one that it would be competent for it to enact itself, and not a law passed in the exercise of the police power. (Citing cases)." *In re Rahrer,* 140 U. S., 545, 560, (35 L. ed. 572, 576).

"The power of Congress to regulate commerce among the several States, when the subjects of that power are national in their nature, is also exclusive. . . . Ib. 555 (574)

* * * * * * *

"It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a State. . . . Ib. 560 (576)

* * * * * * *

"Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdicton." Ib. 564 (577-8)

As Congress cannot delegate any of its powers to regulate interstate commerce, it cannot delegate any power to prohibit such commerce.

In *South Carolina v. United States*, 199 U. S. 437 (50 L. ed. 261) we find the following rule repeated:

"To determine the extent of the grants of power we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood

to be the meaning and scope of those grants." 450 (265)

The Court quoted from *McCulloch v. Md.*, 4 Wheat. 316, 481 (4 L. ed. 579, 607), as follows:

"'. . . Would the people of any one State trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with the power to control th eoperations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.' . . ." 455-6 (267)

* * * * * * *

". . . The opposition to the Constitution came not from any apprehension of danger from the extent of power reserved to the States, but, on the other hand, entirely through fear of what might result from the exercise of the powers granted to the central government. . . ." 456 (268)

The States Cannot Divide an Interstate Journey Into Segments

The reverse of this question has been presented in the case of state laws which have been held to interfere with interstate commerce and which undertook to reach such a shipment and to interpose state regulation before the interstate journey was completed. This Court has not failed to strike down such laws. The question now arises: If a state cannot of its own power surround an interstate shipment with restrictions after it comes within the borders of the state and before the package is broken, can Congress by a mere enactment vest the state government with the power heretofore denied it?

Could Congress have permitted Maryland to impose a tax of $50 upon all importers of foreign goods [*Brown v. Maryland,* 12 Wheat. 419 (6 L. ed. 678)]?

Could Congress have vested Tennessee with the power to impose a tax on a drummer not having a regular licensed house of business in the taxing district [*Robbins v. Taxing District of Shelby County, Tennessee,* 120 U. S. 489 (30 L. ed. 694)]?

Could Congress have permitted Iowa (except for the harmful nature of the product) to pass a law forbidding a common carrier from bringing intoxicating liquors within its borders without first having a certificate required by law? [*George A. Bowman et al. v. Chicago and Northwestern Railway Company,* 125 U. S. 524 (31 L. ed. 700).

(31 L. ed. 700)]?

A sale is as much a part of the interstate commerce journey as is crossing the state border into the state of destination. This was decided early in the history of this country and the opinion written by Marshall who had sat as a member of the convention in Virginia which ratified the Constitution. (Elliot's Debates, Vol. 3, 85). Thirty-six years thereafter in *Brown v. Maryland*, supra, he said that there was no difference in effect between a power to prohibit the sale of an article and a power to prohibit its introduction into the country (439); that the act denied to the importer the right of using the privilege which he had purchased from the United States, until he should have purchased it from the state [448 (687)].

> "The oppressed and degraded state of commerce, previous to the adoption of the constitution can scarcely be forgotten. . . . It may be doubted whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by Congress. . . . 445-6 (688)
>
> • • • • • • •
>
> ". . . To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essen-

> tial ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell. . . . 447 (688)

The Court inquired if this law were held valid,

> "what should restrain a state from taxing any article passing through it from one state to another, for the purpose of traffic? or from taxing the transportation of articles passing from the state itself to another state, for commercial purposes. . . . 449 (689)
>
> "It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister state. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles." 449 (689)

In *Robbins v. Taxing District of Shelby County*, supra, the Court said:

> "It is also an established principle, as already indicated, that the only way in which commerce between the States can be legitimately affected by state laws, is when, by virtue of its police power,

and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the State or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the State, mingled with and forming part of the great mass of property therein. . . . 493 (696)

* * * * * * *

"In a word, it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject. 494 (696)

* * * * * * *

". . . Can the State Legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country are citizens of the United States, as well as of the individual states, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them. 496-7 (697)

* * * * * * *

". . . And if a State can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes which led to it." 498 (698)

And in *George A. Bowman et al. v. Chicago and Northwestern Railway,* supra:

" . . . '. . . It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed.

The produce of Western States may thus be effectually excluded from eastern markets, for though it might bear the imposition of a single tax, it would be crushed under a load of many. It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the States was conferred upon the Federal Government.' 481 (705)

* * * * * * *

"It may be argued, however, that, aside from such regulations as these, which are purely local, the inference to be drawn from the absence of legislation by Congress on the subject excludes state legislation affecting commerce with foreign nations more strongly than that affecting commerce among the States. Laws which concern the exterior relations of the United States with other Nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the Nation. The organization of our state and federal system of government is such that the people of the several States can have no relations with foreign powers in respect to commerce or any other subject, except through the Government of the United States and its laws and treaties. . . ." 482 (706)

* * * * * * *

"Can it be supposed that by omitting any express declarations on the subject, Congress has intended to submit to the several states the decision

of the question in each locality of what shall and what shall not be articles of traffic in the interstate commerce of the country? If so, it has left to each State, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured, or sold in any state and sought to be introduced as an article of commerce into any other. If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort, or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the State would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace, and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several States of the Union, it cannot be supposed that the Constitution or Congress have intended to limit the freedom of commercial inter-

course among the people of the several States. . . ." 493-4 (710)

From the *State Freight Tax*, 15 Wall. 282 (21 L. ed. 146), we take the following:

". . . Beyond all question the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one State to another was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States. A power to prevent embarrassing restrictions by any State was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. . . ." 275 (161)

In *Ward v. Maryland*, 12 Wall. 418 (20 L. ed. 449), involving an act imposing a $300 license tax on non-residents selling by sample, the Court said:

"Evidence to show that the framers of the Constitution intended to remove those great evils in the government [inequality of burden and want of uniformity in commercial regulations[1]] is found in every one of the sections of the Constitution already

[1] Matter in brackets supplied.

referred to, [interstate commerce, equality of privileges and immunities among citizens, duties on imports and exports, and tonnage, clauses[1]] and also in the clause which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, showing that Congress, as well as the States, is forbidden to make any discrimination in enacting commercial or revenue regulations. Strong support to the same view is also derived from the succeeding clause in the same section of the Constitution, which provides that vessels bound to or from a State shall not be obliged to enter, clear, or pay duties in another." 481 (458)

United States v. E. C. Knight Company, 156 U. S. 1 (39 L. ed. 325) arose out of an attempted enforcement of the anti-trust act of Congress. The American Sugar Refining Company undertook to acquire four companies doing business in Pennsylvania and which controlled thirty-three per cent. of the sugar business of the country; thus giving the American Company control of ninety-eight per cent. of all the sugar in the country.

". . . Commerce among the States, as this court has declared, is a unit, and in respect of *that* commerce this is one country, and we are one people. It may be regulated by rules applicable to every part of the United States, and state lines and state

[1] Matter in brackets supplied.

jurisdiction cannot interfere with the enforcement of such rules. . . . Any combination, therefore, that disturbs or unreasonably obstructs freedom in buying and selling articles manufactured to be sold to persons in other States or to be carried to other States—a freedom that cannot exist if the right to buy and sell is fettered by unlawful restraints that crush out competition—affects, not incidentally, but directly, the people of all the States; and the remedy for such an evil is found only in the exercise of powers confided to a government which, this court has said, was the government of all, exercising powers delegated by all, representing all, acting for all. . . ." 32-3 (386)

The Court declared that under the facts the anti-trust act did not apply. It said:

"It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality." 13 (329)

Discussing the contention that the act is constitutional although it embraces subjects not within the power of Congress to regulate commerce.

> "because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress, . ."

the court said:

> ". . . To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. . . ." *The Employers' Liability Cases*, 207 U. S. 463. 502 (L. ed. 297, 311)

In *Mobile v. Kimball*, 102 U. S. 691 (26 L. ed. 288), the Court said that the subjects upon which Congress could act under its power to regulate interstate commerce were of infinite variety.

". . . Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. . . ." 697 (289)

Without the power of Congress there would be

"no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation." (697 (289)

In *Kidd v. Pearson*, 128 U. S. 1 (32 L. ed. 346), it was contended that liquor manufactured in Iowa for shipment to another state was protected by the interstate commerce clause against a local prohibition law. This the Court denied. Discussing its power under the interstate clause the Court said:

". . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would

also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. . . ." 21 (350)

Referring to the object of vesting in Congress the power to regulate commerce so as to insure uniformity of regulation against conflicting and discriminating state legislation the Court said:

"This being true, how can it further that object so to interpret the constitutional provision as to place upon Congress the obligation to exercise the supervisory powers just indicated? The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent. Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement toward the local, detailed, and incongruous legislation required by such interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone.

> Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. These instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory power must be executed by the State; and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. . ." 21-2 (350-1)

Describing the condition that must exist if Congress had the power to regulate the manufacture of commodities intended for interstate commerce the Court said:

> ". . . A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the states, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine." 22 (350)

In *Wabash, St. Louis & Pacific Railway Co. v. Illinois*, 118 U. S. 557 (30 L. ed. 244), the state legislature

undertook to regulate freight rates irrespective of whether the freight was an interstate shipment. The Court said:

> "It cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the State might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to Congress the power to regulate commerce among the states and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. . . ." 572-8 (249)

Those who advocate the validity of the Act will doubtless not deny that the states lack the power to prohibit the sale within their borders of any article of an unexceptional nature moving therein. This principle is based on the conflict of such state law with the Constitution. In the case of prison-made goods, likewise unexceptional in their nature, this conflict with the Constitution is removed and states are allowed to prohibit the sale within their borders of such goods shipped from another state. Unconstitutionality is removed. Constitutionality supplants it. We had thought that this change could be brought about only by an amendment to the Constitution; but now it appears that only a

short cut by way of a congressional enactment is necessary to move from invalidity to validity.

The Report of the Senate Committee

For the purpose of ascertaining the general purpose of the legislation proposed, and the mischiefs sought to be remedied, the Court may examine the statements of supervisors in debate on the passage of an ordinance.

Federal Trade Commission v. Raladam Company, 283 U. S. 643 (75 L. ed. 1324)

Committee reports may be resorted to under proper qualifications.

United States v. St. Paul, Minneapolis & Manitoba Railway Company et al., 247 U. S. 310 (62 L. ed. 1130);

Duplex Printing Press Co. v. Deering et al., 254 U. S. 443 (65 L. ed. 349).

Upon examining the committee report (No. 844, 70th Congress, 2d. Session, 654-5) we find the purposes of the Hawes-Cooper Act set out as follows:

"Supported by Three Great Elements of Society

"Three distinct and powerful elements in American life earnestly indorsed this measure, each from a separate motive and different viewpoint.

"The American Federation of Labor urged the passage of this bill through its properly constituted leaders, and has without exception indorsed the measure through its State organizations.

"The viewpoint of labor is that under existing conditions the products of convicts are permitted to flow through channels that bring about a ruinous competition with the labor of free American citizens, 5,000,000 of whom the labor organization represents.

"From an entirely different viewpoint manufacturers, representing more than $2,500,000,000 in investments and employing both union and nonunion labor, were heard by the committee urging the passage of the measure for the reason, they stated, that under existing conditions the continuous production of prison-made products in certain centralized industries creates a condition by which the entire competitive market is demoralized and under which the products of free manufacturers are forced into ruinous competition with goods made by convicts.

"Wholly aside from these divergent reasons, the General Federation of Women's Clubs, through their properly constituted representatives, and speaking for some 14,000 affiliated branches in the 48 States, urged before the committee the passage of this act on the broad humanitarian ground that

under existing conditions all attempts to bring about a proper reform in the prisons of the Nation were being frustrated by the legal impediment under which State laws are made ineffective through interstate commerce.

"The blind also appeared, through properly authorized representative of the national organization looking to the betterment of conditions for the blind, in support of this measure. It was brought out that convict labor is dominating the broom industry, which industry is the best suited for those so afflicted.

"In addition to these were representatives of the prison reform organization with branches in the States.

"It is significant that all five of these elements declared that their ultimate object was the same, to wit, the continuous employment of the convict for the benefit of the State, for his own welfare and rehabilitation, and for the care of his family, and the removal of his products from the field of ruinous competition with both free labor and invested capital."

The report continues:

"That prisoners must be employed is one of the principles upon which this bill is founded. As a

result of the passage of this measure the prisoner of the future may not only be employed but may be employed in such a way as to bring about, through scientific methods, his possible rehabilitation for reentrance into society. . . .

* * * * *

"Two Years Given for Readjustment

"The committee is not unmindful of the practical problem presented in certain States of the necessity of changing present systems. It is this practical problem to which the conscientious wardens and prison officals who appeared before the committee will have to give their attention. It is much the simpler program to go on as at present. To change means the employment of time and study in the reorganization of prison management.

"Realizing this the committee amended the bill as introduced by providing that it shall not take effect until two years from date of passage.

"This amendment meets the desires of those who favor the principle of the bill, but who are anxious for time necessary to meet the practical problem in their own State.

"The 2-year clause in the bill will make it possible for the prison management of any State to

make such surveys and such reorganization as may be necessary.

"This bill is a necessary step in a national program of prison reorganization which began some years ago with the abolition in a majority of States of the obnoxious contract system, but which has been delayed and hampered by the existence of the legal impediment to which reference has been made.

"In those States where the more modern system of prison employment has been adopted through legislative enactment, prison officials reported to the committee that representatives of the General Federation of Women's Clubs, the American Federation of Labor, and the manufacturers had been cooperating to make the new system effective.

"The same zeal and activity on the part of these three elements of American life may be confidently relied upon in the future to assist the Government of any State in which the people are desirous of putting into effect a new system of penal conduct. . . ."

Truly paternal is this attitude of Congress. Considerate indeed of the states is that body to grant them additional time to meet their prison problems. Grateful should they be for the offer of the assistance of the three elements of society which are given credit for this measure, in planning a reorganization of their penal

systems and in putting into effect this national program of prison reformation.

It thus appears that the bill was passed in order (1) to eliminate the competition of prison industries from free labor, and (2) to eliminate prison products from competition with those of manufacturers representing more than $2,500,000,000 in investments.

From a document of directors of penal institutions accompanying the report we observe that: "It is estimated that the amount of goods produced by convict labor represents not more than one-twentieth of one per cent of the products of outside labor—the amount of the competition is infinitesimally small." (Ib. 677, 2nd Col. Lines 20-23.)

Thus the power of the Government of the United States is invoked to protect the billions of invested capital from the labor of the prisoner. Shall we see the day when this protection renders a sentence to hard labor impossible of enforcement?

CONCLUSION

The purpose of the Hawes-Cooper Act is plainly seen. It is to free labor organizations and certain manufacturers from the competition of prison labor infinitesimally slight though it be. To open the door to such legislation on the part of Congress is to erect like barriers in favor of any activity, industry or organiza-

tion which becomes politically strong enough to compel favorable legislation. It would vest Congress with the power to say, according to its whim or fancy, what articles should move and what should not move among the states. It would place in the hands of a majority in Congress the power to select any state, either on account of its location, industries, or for any other reason political or otherwise, and pass laws confining the products of such state within its own borders. We had thought that an embargo could be lifted by Congress against only foreign products. But now a power is claimed which if permitted to be exercised would result in erecting barriers around unfavored states. The conflicting and irritating practice of the states before the Constitution was adopted would be increased a thousand fold through the exercise by Congress of this newly-found power over the vast commerce of this country.

Today it is prison labor which its opponents after beating at the door of Congress for fifty years have succeeded in outlawing. Tomorrow it may be non-union labor. Today nineteen states under the spur of the Hawes-Cooper Act have outlawed prison products. Obviously, the other states will not be long behind.

What becomes of the prisoner? Who speaks for him? A ward of the state over whom the state should exercise its powers in the interest of his rehabilitation and re-entrance into society, he enters the doors of prison to face a term of utter idleness. His term ends. He returns to society, having lost any habit of industry

which he ever had. A ward of the state becomes a ward of society.

What of the conditions of state treasuries which, through the hard labor of their prisoners have been assisted in bearing the cost of government? More taxes are required to meet the costs of crime. Prisons which have been partially self-supporting become dependent entirely on the public treasury. For what purpose is the public called on again to increase its tax burden? We need not go far to seek an answer. The report of the Senate Committee declares it: To remove competition from two favored groups.

From what provision of the Constitution can the power of Congress be derived to interfere in these fundamental duties and powers of sovereign states?

This problem cannot be solved today nor tomorrow. It has existed and will exist as long as human imperfection remains. Laws will be violated. Crimes will be committed. Men will be punished. The burden in many forms rests on society. It cannot be brushed away by a mere act of Congress. Labor and capital must bear their share of this burden wherever they may

be located and under what circumstances they may exist.

Respectfully submitted,

THOMAS E. KNIGHT, JR.,
Attorney General.

PERRY W. TURNER,

WM. LOGAN MARTIN,
Counsel.

Birmingham, Ala.

I hereby certify that I have forwarded, postage prepaid, a copy of the foregoing brief and argument to the attorneys general of all the defendant states.

This December 22, 1988.

WM. LOGAN MARTIN.

APPENDIX

The Hawes-Cooper Act (45 *Stat. at L.* 1084)

CHAP. 79.—An Act To divest goods, wares, and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all goods, wares, and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported into any State or Territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such State or Territory be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

SEC. 2. This Act shall take effect five years after the date of its approval.

Approved, January 19, 1929.

The Webb-Kenyon Act (37 *Stat. at L.* 699)

CHAP. 90.—An Act divesting intoxicating liquors of their interstate character in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

The Child Labor Act (39 *Stat. at L.* 675)

CHAP. 432.—An Act to prevent interstate commerce in the products of child labor, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the time of the removal of such product therefrom children under the age of sixteen years have been employed or permitted to work, or any article or commodity the product of any mill, cannery, workshop, factory, or manufacturing establishment, situated in the Unted States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between th ages of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock postmeridian, or before the hour of six o'clock antemeridian: *Provided,* That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any article or commodity under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such article or commodity before the beginning of said prosecution.

Sec. 2. That the Attorney General, the Secretary of Commerce, and the Secretary of Labor shall constitute a board to make and publish from time to time uniform rules and regulations for carrying out the provisions of this Act.

Sec. 3. That for the purpose of securing proper enforcement of this Act the Secretary of Labor, or any person duly authorized by him, shall have authority to enter and inspect at any time mines, quarries, mills, canneries, workshops, factories, manufacturing establishments, and other places in which goods are produced or held for interstate commerce; and the Secretary of Labor shall have authority to employ such assistance for the purposes of this Act as may from time to time be authorized by appropriation or other law.

Sec. 4. That it shall be the duty of each district attorney to whom the Secretary of Labor shall report any violation of this Act, or to whom any State factory or mining or quarry inspector, commissioner of labor, State medical inspector, or school-attendance officer, or any other person shall present satisfactory evidence of any such violation to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States without delay for the enforcement of the penalties in such cases herein provided: *Provided*, That nothing in this Act shall be construed to apply to bona fide boys' and girls' canning clubs recognised by the Agricultural Department of the several States and of the United States.

Sec. 5. That any person who violates any of the provisions of Section one of this Act, or who refuses or obstructs entry or inspection authorized by section three of this Act, shall for each offense prior to the first conviction of such person under the provisions of this Act, be punished by a fine of not more than $200, and shall for each offense subsequent to such conviction be punished by a fine of not more than $1,000, nor less than $100, or by imprisonment for not more than three months, or by both such fine and imprisonment, in the discretion of the court: *Provided,* That no dealer shall be prosecuted under the provisions of this Act for shipment, delivery for shipment, or transportation who establishes a guaranty issued by the person by whom the goods shipped or delivered for shipment or transportation were manufactured or produced, resident in the United States, to the effect that such goods were produced or manufactured in a mine or quarry in which within thirty days prior to their removal therefrom no children under the age of sixteen years were employed or permitted to work, or in a mill, cannery, workshop, factory, or manufacturing establishment, in which within thirty days prior to the removal of such goods therefrom no children under the age of fourteen years were employed or permitted to work, nor children between the ages of fourteen years and sixteen years employed or permitted to work more than eight hours in any day or more than six days in any week or after the hour of seven o'clock postmeridian or before the hour of six o'clock antemeridian; and in such event, if the guaranty contains any false statement of a material fact, the

guarantor shall be amenable to prosecution and to the fine or imprisonment provided by this section for violation of the provisions of this Act. Said guaranty, to afford the protection above provided, shall contain the name and address of the person giving the same: *And provided further*, That no producer, manufacturer, or dealer shall be prosecuted under this Act for the shipment, delivery for shipment, or transportation of a product of any mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment, if the only employment therein, within thirty days prior to the removal of such product therefrom, of a child under the age of sixteen years has been that of a child as to whom the producer or manufacturer has in good faith procured, at the time of employing such child, and has since in good faith relied upon and kept on file a certificate, issued in such form, under such conditions, and by such persons as may be prescribed by the board, showing the child to be of such an age that the shipment, delivery for shipment, or transportation was not prohibited by this Act. Any person who knowingly makes a false statement or presents false evidence in or in relation to any such certificate or application therefor shall be amenable to prosecution and to the fine or imprisonment provided by this section for violations of this Act. In any State designated by the board, an employment certificate or other similar paper as to the age of the child, issued under the laws of that State and not inconsistent with the provisions of this Act, shall have the same force and effect as a certificate herein provided for.

Sec. 6. That the word "person" as used in this Act shall be construed to include any individual or corporation or the members of any partnership or other unincorporated association. The term "ship or deliver for shipment in interstate or foreign commerce" as used in this Act means to transport or to ship or deliver for shipment from any State or Territory of the District of Columbia to or through any other State or Territory or the District of Columbia or to any foreign country; and in the case of a dealer means only to transport or to ship or deliver for shipment from the State, Territory, or district of manufacture or production.

Sec. 7. That this Act shall take effect from and after one year from the date of its passage.

Approved, September 1, 1916.

The Child Labor Tax Act (40 *Stat. at L.* 1057, 1138)

CHAP. 18.—An Act to provide revenue, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

Sec. 1200. That every person (other than a bona fide boys' or girls' canning club recognized by the Agricultural Department of a State and of the United States) operating (a) any mine or quarry situated in

the United States in which children under the age of sixteen years have been employed or permitted to work during any portion of the taxable year; or (b) any mill, cannery, workshop, factory, or manufacturing establishment situated in the United States in which children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen years have been employed or permitted to work more than eight hours in any day or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian, during any portion of the taxable year, shall pay for each taxable year, in addition to all other taxes imposed by law, an excise tax equivalent to 10 per centum of the entire net profits received or accrued for such year from the sale or disposition of the product of such mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment.

Sec. 1201. (Relates to computation of net profits and deductions).

Sec. 1202. That if any such person during any taxable year or part thereof, whether under any agreement, arrangement, or understanding or otherwise, sells or disposes of any product of such mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment at less than the fair market price obtainable therefor either (a) in such manner as directly or indirectly to benefit such person or any person directly or indirectly interested in the business of such person; or (b) with

intent to cause such benefit; the gross amount received or accrued for such year or part thereof from the sale or disposition of such product shall be taken to be the amount which would have been received or accrued from the sale or disposition of such product if sold at the fair market price.

Sec. 1208. (a) That no person subject to the provisions of this title shall be liable for the tax herein imposed if the only employment or permission to work which but for this section would subject him to the tax, has been of a child as to whom such person has in good faith procured at the time of employing such child or permitting him to work, and has since in good faith relied upon and kept on file a certificate, issued in such form, under such conditions and by such persons as may be prescribed by a board consisting of the Secretary, the Commissioner, and the Secretary of Labor, showing the child to be of such age as not to subject such person to the tax imposed by this title. Any person who knowingly makes a false statement or presents false evidence in or in relation to any such certificate or application therefor shall be punished by a fine of not less than $100, nor more than $1,000, or by imprisonment for not more than three months, or by both such fine and imprisonment, in the discretion of the court.

In any State designated by such board an employment certificate or other similar paper as to the age of the child, issued under the laws of that State, and not inconsistent with the provisions of this title, shall have

the same force and effect as a certificate herein provided for.

(b) The tax imposed by this title shall not be imposed in the case of any person who proves to the satisfaction of the Secretary that the only employment or permission to work which but for this section would subject him to the tax, has been of a child employed or permitted to work under a mistake of fact as to the age of such child, and without intention to evade the tax.

Sec. 1204. That on or before the first day of the third month following the close of each taxable year, a true and accurate return under oath shall be made by each person subject to the provisions of this title to the collector for the district in which such person has his principal office or place of business, in such form as the Commissioner, with the approval of the Secretary, shall prescribe, setting forth specifically the gross amount of income received or accrued during such year from the sale or disposition of the product of any mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment, in which children have been employed subjecting him to the tax imposed by this title, and from the total thereof deducting the aggregate items of allowance authorized by this title, and such other particulars as to the gross receipts and items of allowance as the Commissioner, with the approval of the Secretary may require.

Sec. 1205. That all such returns shall be transmitted forthwith by the collector to the Commissioner, who shall, as soon as practicable, assess the tax found due and notify the person making such return of the amount of tax for which such person is liable, and such person shall pay the tax to the collector on or before thirty days from the date of such notice.

Sec. 1206. That for the purposes of this Act the Commissioner, or any other person duly authorized by him, shall have authority to enter and inspect at any time any mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment. The Secretary of Labor, or any person duly authorized by him, shall, for the purpose of complying with a request of the Commissioner to make such an inspection, have like authority, and shall make report to the Commissioner of inspections made under such authority in such form as may be prescribed by the Commissioner with the approval of the Secretary of the Treasury.

Any person who refuses or obstructs entry or inspection authorized by this section shall be punished by a fine of not more than $1,000, or by imprisonment for not more than one year, or both such fine and imprisonment.

Sec. 1207. That as used in this title the term "taxable year" shall have the same meaning as provided for the purposes of income tax in section 200. The first taxable year for the purposes of this title shall be the

period between sixty days after the passage of this Act and December 31, 1919, both inclusive, or such portion of such period as is included within the fiscal year (as defined in Section 200) of the taxpayer.

* * * * *

Approved, 6:55 p. m., February 24, 1919.

The Wilson Act (26 *Stat. at L.* 313)

CHAP. 728.—An act to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

Approved, August 8, 1890.

FILE

Supr

THE STAT

THE ST
CH

BRIEF O
SUP

INDEX.

	Page
Appendix "A"	30
Appendix "B"	31
Argument	22
Citations	(ii)
Propositions Relied on	17
Service of Brief on plaintiff, proof of	32

CITATIONS.

Cases Cited.

	Page
Adams Express Co. v. Kentucky, 238 U. S. 190 at p. 197	19, 20
Albright v. Bd. of Comm'rs, 194 Pac. 913 (1921), Kansas	21
Clark Distilling Co. v. Western Md. R. R. Co., 242 U. S. 311 (1917)	20, 25
Florida v. Mellon, 273 U. S. 12	20
Hamilton v. Kentucky Distilleries & W. Co., 251 U. S. 146, at p. 156	20, 25
Hipolite Egg Co. v. U. S., 220 U. S. 45	20
Lottery Case, 188 U. S. 321, at p. 357, et seq.	19, 20, 25
Louisiana v. Texas, 176 U. S. 1, at p. 16	18, 23
Rahrer, In re, 140 U. S. 545, at p. 561	19, 20, 21, 23, 25
Rhodes v. Iowa, 170 U. S. 412, 420 (1898)	20
Silz v. Hesterberg, 211 U. S. 31 (1908)	20
Scott v. Frazier, 258 Fed. 669, 671. (Decided, 1920, on another point in 253 U. S. 243)	21
Young, Ex Parte, 209 U. S. 123, 161	17, 27

Statutes Cited.

Acts of 1933 (Indiana) Chapter 269	30
Hawes-Cooper Act (Title 49 U. S. C. A. Sec. 65)	31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. ——— Original

THE STATE OF ALABAMA - - - - Complainant,

v.

THE STATES OF ARIZONA, CALIFORNIA, COLORADO, ET AL. - - - - - - - Defendants.

BRIEF OF THE DEFENDANT STATE OF INDIANA IN SUPPORT OF ITS RETURN TO RULE TO SHOW CAUSE WHY LEAVE TO FILE BILL OF COMPLAINT SHOULD NOT BE GRANTED.

I.

STATEMENT OF THE CASE.

On May 8, 1933, a motion for leave to file the bill of complaint in the above entitled cause was submitted to the court, and thereafter on May 15, 1933, a rule was entered requiring the several defendants to show cause why leave to file said bill of complaint should not be granted. This rule was made returnable in printed form on October 9, 1933. Returns were filed by the various defendants and the cause was thereupon assigned for argument on said rule and returns on January 8, 1934.

The Complaint.

The complaint, omitting formal parts, is as follows:

"To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

"The State of Alabama brings this its bill of complaint against the State of Arizona, California, Colorado, Idaho, Indiana, Iowa, Kentucky, Michigan, Minnesota, Montana, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Washington and Wisconsin, and says:

"1. The plaintiff is the State of Alabama, one of the states of the United States of America.

"2. The defendants are the States of Arizona, California, Colorado, Idaho, Indiana, Iowa, Kentucky, Michigan, Minnesota, Montana, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Washington and Wisconsin, all being states of the United States of America.

"3. The plaintiff brings this suit for the protection of its rights and powers as a sovereign state.

"4. The purpose of this suit is to have declared unconstitutional certain laws of the defendant states and an act of the Congress of the United States, all of which violate the Commerce Clause of, and the latter violates the Tenth Amendment to, the Constitution of the United States, as a result of the operation of which the plaintiff has suffered and will continue to suffer great and irreparable financial loss and a dimunition of its sovereign powers of government.

"5. (a) The plaintiff in the exercise of its powers of government and as a result of the violation of its criminal laws had in its several penal institutions during 1932 a total of 7,491 prisoners. As a result of the ex-

tension of pardons and paroles by proper authority this population was reduced to a daily average of 5,515. Of this number 2,762 were confined in the plaintiff's Kilby, Speigner and Wetumpka Prisons, and of these 413 were employed in a cotton mill, and 449 in a shirt factory, at Kilby Prison, and 394 in a cotton mill at Speigner Prison; 253 were employed in an underwear factory at Wetumpka until August 1, 1932.

"(b) At the Atmore Prison Farm consisting of 8,360 acres and devoted exclusively to agriculture, approximately 600 prisoners were employed. The remaining prison population at Atmore and at Kilby, Speigner and Wetumpka, except the aged, infirm and ill in hospital, were assigned to duties as cooks, cell cleaners, sweepers, hospital stewards and prison attendants; or in dairy work or gardening, or were engaged in machine shops, or in local highway maintenance on their prison grounds.

"(c) At Prison Number Four, consisting of 2,368 acres of land and devoted exclusively to agriculture, approximately 450 prisoners were employed in activities similar to those engaged in at Atmore Prison Farm.

"(d) Of the remaining average daily prison population, 1,241 were employed in road camps conducted in connection with road building and maintenance.

"6. The foregoing daily average of activities and employments while covering the year 1932, may be accepted as applicable to the year 1933 up to the time of filing this bill, with the exception of Wetumpka Prison, the activities of this prison having been terminated and the building in which the same were conducted having been demolished during the latter part of 1932, the prisoners engaged therein being distributed among other prisons in the state.

"7. The plaintiff for the purpose of providing employ-

ment for its prison population has from time to time made considerable capital investment, consisting in the main of (a) 18,235 acres of land, 13,101 acres of which are in cultivation, (1) 5,000 acres of which produce a crop of 2,500 bales of cotton, (2) 900 acres of which produce a potato crop of 150,000 bushels, and (3) 8,301 acres being tilled with prison labor provide a considerable part of the food and supplies for the inmates of the penal institutions herein referred to and feedstuffs for plaintiff's livestock; (b) a cotton mill and shirt factory at Kilby Prison, including machinery and equipment with a capacity of 12,450 spindles; and (c) a cotton mill at Speigner Prison, including machinery and equipment with a capacity of 9,664 spindles.

"8. On June 1, 1927, plaintiff executed with East Coast Manufacturing Company, a corporation of Delaware, an agreement (herein called the agreement) for the purchase by the latter of chambray (goods made from cotton) manufactured at Kilby and Speigner cotton mills and for the furnishing by the plaintiff of prison labor for the manufacture of work shirts, the agreement expiring on March 31, 1933. East Coast Manufacturing Company assigned its interest in the agreement and during the term thereof, to Gordon East Coast Company, which assumed the performance of the terms thereof.

"The agreement contained a provision under the terms of which between the first and tenth days of March, June, September and December of each year, the parties thereto were to agree upon the fair market prices to be paid for the ensuing period of three months; or by common agreement for a six-month period as set out. The East Coast Manufacturing Company (herein called the company, which will also designate Gordon East Coast Company as successor) provided the necessary equipment for manu-

facturing work shirts out of the chambray made by the plaintiff sufficient to furnish employment to not less than 400 nor more than 500 persons in the making of such shirts, and in operating the cutting tables and the machinery and appliances provided by the company in the making of such work shirts; the agreement providing also for proper handling, folding, pressing, checking, etc.

"The agreement further provided that the plaintiff should furnish all the necessary light, heat and power and that the prisoners should at all times be under the entire management and control of the plaintiff. It was the duty of the company to furnish supervision and instruction for the purpose of teaching and instructing the prisoners in the proper manufacture of such work shirts; the instructors to be men of good moral character to be approved by the plaintiff and to abide by all prison rules and regulations in their contact with prisoners.

"The company was to pay the plaintiff for the first period of three months for the prison labor used in carrying out the terms of the agreement the sum of $.75 for each dozen shirts made by the prisoners. The company was to inaugurate what is known as the 'overtime plan,' compensation to be paid to prisoners on the basis of $.50 for each additional daily task of 18 shirts, to be figured on the basis of the total production of the prisoner per week. Under this agreement which was in effect from June 1, 1927, to April 1, 1933, the plaintiff made at the Kilby shirt factory approximately 3,500 dozen shirts weekly.

"The agreement contained a further provision as follows:

14. This agreement shall be terminated if it is or shall become unlawful by the laws or regulations of the United States to sell or dispose of

or transport any material or articles manufactured by prison labor, or if it shall become unlawful to engage prison labor in the manufacture of the articles which are to be manufactured under the terms of this agreement, or if it shall become unlawful under the laws or regulations of the State of Alabama to manufacture the aforesaid products with the aid of prison labor in the State of Alabama, or to ship or transport the same anywhere within the State of Alabama, or if there is any act passed by the State of Alabama requiring prison-made goods to be labeled as such, in such event this contract shall become null and void ninety days after said law becomes effective.

"Plaintiff has passed no law and made no regulation which forbids the use of prison labor as provided in the agreement; and it is not unlawful to ship or transport prison-made goods within plaintiff state nor are such goods required to be labeled as such.

"9. Under the provisions of section 3 of the agreement and during the term thereof the company paid the plaintiff an approximate average of $.75 per dozen shirts for the labor of its prisoners so employed.

"10. During the year 1932 the plaintiff kept 22,114 spindles constantly employed in the manufacture of cotton cloth at Kilby and Speigner Prisons, selling eighty per cent of all such cloth to the company (or under its direction.)

"11. The agreement expiring March 31, 1933, the plaintiff sought to renew or extend the same but the company declined to agree to such renewal or extension except for a period of the three months of April, May and June, and at a price of approximately $.54 per dozen shirts and $.05 per yard for chambray, which the plaintiff accepted.

The result of such renewal was to reduce the gross income of the plaintiff from the manufacture of shirts for the second quarter of 1933 by the total amount of $11,500 less than the gross income for the previous quarter.

"12. In the defendant states of California, Colorado, Iowa, Kentucky, Minnesota, Montana, New Jersey, Ohio, Oklahoma, Oregon, Washington and Wisconsin, there are in effect at this time laws requiring prison-made goods to be labeled or branded; and in the states of Idaho, Indiana, Michigan, New York, North Carolina and Pennsylvania, laws have been recently enacted effective January 19, 1934, forbidding the sale of such goods; and in the State of Arizona a law has been recently enacted and now is in effect forbidding the sale of prison-made goods; all such laws of the defendant states being set out hereinafter as Appendix A and made a part hereof.

"13. The Congress of the United States on January 19, 1929, enacted what is known as the Hawes-Cooper Act (herein called the Act) which is set out hereinafter as Appendix B and made a part hereof.

"14. For some years past the shirts made at its shirt factory at Kilby Prison, and shirts made elsewhere in the United States out of the chambray manufactured by the plaintiff at Kilby and Speigner Prisons, have found ready sale in the defendant states in amounts per annum in excess of those set after the name of each of the defendant states, respectively:

Arizona	$1,000
California	15,000
Colorado	15,000
Idaho	10,000
Indiana	50,000
Iowa	6,000
Kentucky	50,000

Michigan	30,000
Montana	10,000
New Jersey	20,000
New York	30,000
North Carolina	5,000
Ohio	30,000
Oklahoma	15,000
Oregon	10,000
Pennsylvania	25,000
Washington	10,000
Wisconsin	15,000
Total	$347,000

"Of the foregoing enumerated amounts approximately thirty per cent represents the amount paid to the plaintiff for its labor and material. Due to the laws of the defendant states as set out in Appendix A, and as a result of the necessary effect of the Act the plaintiff, after undertaking to contract for its prison labor and sell its goods, has up to the time of the filing of this bill been unable to make a firm agreement after July 1, 1933, for the employment of the labor of any of its prisoners in the manufacture of shirts or for the sale of any of the goods manufactured by the plaintiff with the labor of such prisoners, for the reason that as plaintiff is informed and on information and belief states, the wholesale and retail merchants who ordinarily deal in shirts made either by the prison labor or from the cloth manufactured by the prison labor of plaintiff are unwilling to make any purchases beyond such as are necessary to supply their immediate demands; nor are they willing to have on hand at the effective date of the Act any prison-made goods for the reason that under the laws of the defendant states, as set out in Appendix A, such

merchants will be required to mark and brand such goods, or will be forbidden to sell the same, as a result of which the market price thereof will be greatly lessened in the states requiring the goods to be so marked or branded, although the goods are of themselves harmless, their quality remains unchanged and is not inferior to that of like and comparable goods made by private industry; all due to the unmerited public prejudice which has been aroused against the manufacture of such goods by prison labor and which has found its reaction in the passage of the laws of the defendant states as set out in Appendix A, and of the Act.

"15. As a direct result to the plaintiff of the approach of the effective date of the Act, and of the laws of the defendant states as set out in Appendix A, plaintiff lost during the second quarter of the present year in the hire of its prison labor engaged in making shirts the sum of $11,500; and on account of the laws of the defendant states as set out in Appendix A, which would be patently ineffective and invalid without the Act to give them effect and validity, and on account of the terms of the Act, if the plaintiff is successful in finding any market for the sale of such labor for the last six months of the present year, it cannot hope to secure for the hire of its prison labor in the making of shirts a price equal to its present price of $.54 per dozen shirts, thus resulting in a loss to plaintiff for such labor for the last six months of the present year a sum greater than $23,000; and if the plaintiff is unable to sell the products of its cotton mills as at present and by contract, it will be required to organize a selling agency or sell such goods through selling agencies now existing at an additional cost or loss to the plaintiff amounting to at least $13,000 for the last six months of the present year.

"16. Heretofore plaintiff has used its cotton crop in its cotton mills and has sold approximately ninety per cent of its potato crop in the produce markets of the country. If the marking and branding laws of the defendant states as set out in Appendix A are valid, it will be difficult if not impossible, for any of its cotton crop to be sold in any of the defendant states having such laws for the reason that goods made of the same and shipped in interstate commerce are required to be marked and branded before the same are sold, indicating to the public that they are made of cotton produced by prison labor; and it will be likewise difficult if not impossible for any of its potato crop to be sold in any of the defendant states having marking and branding laws for the like reason that whenever any of the same is sold in the markets of such states the baskets or crates in which the same are kept and sold will be required to be tagged or marked showing that the potatoes were produced by prison labor; all resulting in a probable loss to the plaintiff of more than $150,000 per annum.

"17. There is nothing exceptional about the goods manufactured by the plaintiff and the shirts made by it and they are no different from similar goods and shirts made in factories in which free labor is employed; nor is there anything harmful, deleterious, injurious or unhealthful in such goods or in handling the same in interstate commerce or otherwise. The method of manufacture of the chambray is similar to the method used in factories where free labor is employed and there is no difference in quality between goods made by prison labor and like goods made by the labor of private industry. There is nothing exceptional about the cotton and potatoes produced by the plaintiff and they are no different from like products resulting from the employment of free

labor; nor is there anything harmful, deleterious, injurious or unhealthful in such products or in handling the same in interstate commerce or otherwise. There is no difference in quality between such products resulting from prison labor and like products resulting from the employment of free labor.

"18. The investments of the plaintiff in its Kilby and Speigner cotton mills and in its Kilby shirt factory amounting to a sum in excess of $300,000 will be rendered practically valueless as a result of the inability of the plaintiff to find an employer of its idle convict labor and a market for its prison-made goods. In addition to this loss, the total annual expense of maintaining its idle prisoners released from its cotton mills and shirt factory and those released from its cotton and potato farming activities, amounting to approximately $550,000 per annum, will be added to its necessary governmental expenses and will impose an additional burden on plaintiff's taxpayers.

"19. The financial loss suffered by the plaintiff as a result of the enforcement of the laws of the defendant states as set out in Appendix A, while a matter of considerable importance to the plaintiff, is not the sole nor even the major injury which plaintiff will suffer as a result of such enforcement. The plaintiff undertakes not only to discipline its prisoners as a punishment for crime, but to interest them in industrial activity and train them so that they may make an honest livelihood upon the expiration of their terms. Without real work available, which is hard and steady, it is difficult to transform, redeem or rehabilitate a prisoner so as to make of him a law-abiding citizen upon his release from prison. It is inevitable that the performance of any kind of constructive work must come in conflict and in competition with

similar work performed by free labor outside prison walls, and it is likewise inevitable that the rehabilitation of one who has committed crime cannot be brought about if his entire time is taken up only with recreation, physical exercise, moving pictures, lectures, baseball games, library work and other entertainment.

"As set out herein, the plaintiff's 5,515 prisoners are engaged in many and various activities, 1,256 of whom have been customarily and are now employed in the mills and shirt factory referred to. As a result of the failure to secure a market after January 1, 1934, for plaintiff's goods plaintiff will find these 1,256 prisoners added to its present list of unemployed. Likewise, as a result of the failure to secure a market after January 1, 1934, for the cotton and potatoes produced on the plaintiff's farms, the plaintiff will find 580 prisoners heretofore engaged in such farming activities added to its list of unemployed. Such additional unemployment will have a very serious effect on its prison population. It is undeniable that prisoners who have no productive labor to perform become restless, untractable, unruly and ultimately desperate, presenting difficult problems to prison officials, sometimes resulting in riots in which prisons are fired with resultant loss of life and property. Nor is it extraordinary for prisoners who sit in idleness day after day and year after year, and who are deprived of productive labor, ultimately to lose their reason and become insane.

"20. Notwithstanding the invalidity of the Act, and of the fact that under its terms it does not become effective until January 19, 1934, its very existence is sufficient to bring about after January 1, 1934, the probable unemployment of 1,256 prisoners, now engaged in the cotton mills and shirt factory of the plaintiff, and the

probable unemployment of 580 prisoners now engaged in producing cotton and potatoes on the farms of the plaintiff, and this unemployment will last until this court shall restrain the operation of the Act or declare the same invalid, or until the plaintiff undertakes to provide activities in lieu of its mill and shirt industries, and cotton and potato farming. If plaintiff undertakes to provide such activities, limited as it finds itself to markets within its own borders, it will be required to construct industrial plants, manufacturing among other commodities, clothing for the inmates of its eleemosynary institutions, text-books and furniture for its schools, printing, stationery and furniture for its county and municipal officers and supplies for all of them. Such investment is reasonably estimated at between $700 and $1,000 per prisoner, or a total of more than $1,000,000 which the plaintiff would be required to invest in plants for the manufacture of clothing, text-books, furniture, printing, stationery and supplies. Such an investment the plaintiff is not in financial position to undertake. Its income for the fiscal year ending September 30, 1932, was nineteen and 64-100 per cent less than that for the preceding year and it does not appear at this time that such decrease will be less for the present fiscal year. The plaintiff, therefore, finds itself in such a situation that its income from taxes is insufficient to meet its appropriations for normal governmental purposes and that the financial condition of the public is such that the imposition and exaction of additional taxes should not be made nor should additional indebtedness be incurred for the purpose of creating capital investments to provide industry for its idle prison population.

"In lieu of providing such industrial activities, plaintiff will be required to begin the construction not later

than October 1, 1933, of additional prisons in order to house safely and comfortably a part of its prison population which will become idle on January 1, 1934. At the present time this prison population which is employed in its shirt factory and cotton mills is divided into night and day shifts, and in this way the constant crowding of prisoners which would otherwise result is avoided. With employment in its shirt factory and cotton mills terminated, such crowded conditions will arise and the plaintiff will be required to construct additional prisons which, if of a temporary construction not built of brick or stone, will cost not less than $100,000.

"21. Plaintiff avers that the laws of the defendant states as set out in Appendix A, conflict with the Commerce Clause of the Constitution of the United States under which Congress has power to regulate commerce among the several states (Art. I, Sec. 8, Cl. 3) and likewise the Hawes-Cooper Act conflicts with the Commerce Clause, Congress being without power to impose burdens on commerce among the states except in those instances where Congress deals with activities or objects which are harmful to the public health, morals or welfare.

"The Act results in imposing burdens on the transportation in interstate commerce of goods made in prisons, of goods made from cotton produced by prison labor and of farm products tilled by such labor, all as an exercise of the police powers of the states, which it is not within the power of Congress to do. The Act likewise undertakes to control the plaintiff in the exercise of its police power over the employment and occupation of its prison population, to invade the control by the plaintiff of a matter purely local in its character and to destroy the sovereignty of the plaintiff in the exercise of police powers reserved to it under the Tenth Amendment to the Constitution.

PRAYER.

"Inasmuch as plaintiff has no adequate remedy at law for the injuries herein complained of and can obtain appropriate relief only in a court of equity, plaintiff prays:

"1. That this court shall by its final judgment order, adjudge and decree that the several laws of the defendant states as set out in Appendix A, are invalid and inoperative as to the plaintiff, and are in violation of the Constitution of the United States and void and of no effect.

"2. That this court shall by its final judgment order, adjudge and decree that the Act of Congress approved January 19, 1929, entitled "A bill to divest goods, wares and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain cases," is in violation of the Constitution of the United States and, therefore, void and of no effect.

"3. That the defendants, the States of Arizona, California, Colorado, Idaho, Indiana, Iowa, Kentucky, Michigan, Minnesota, Montana, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Washington and Wisconsin, and all and several the persons in power under their authority, be restrained and perpetually enjoined by order of this court from attempting to enforce the statutes as set out in Appendix A.

"4. That until final hearing shall have been had herein and the final decree of this court shall have been rendered, the defendants, the States of Arizona, California, Colorado, Idaho, Indiana, Iowa, Kentucky, Michigan, Minnesota, Montana, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Washington and Wisconsin, and all and several the persons in power under their authority, be restrained and en-

joined from enforcing or attempting to enforce the statutes set out in Appendix A.

"5. That such other and further relief whether herein specifically prayed for or not, be granted, as right and justice shall require, and as to this court shall seem meet, necessary, just and proper.

"6. That a subpoena of the United States of America be issued out of and under the seal of this court, directed to the States of Arizona, California, Colorado, Idaho, Indiana, Iowa, Kentucky, Michigan, Minnesota, Montana, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Washington and Wisconsin, to be served upon the governor and the attorney-general of each, commanding the defendants on a day certain to be therein named, to be and appear before this Honorable Court, and then and there to answer, but not under oath, answer under oath being specifically waived, all and singular the averments of this bill, and to perform and obey such order, direction and decree as may be made against the defendants in the premises."

Attached to and made a part of this complaint are the acts of the several defendant states which are attacked and also the Act of Congress, the Hawes-Cooper Act, which it is claimed is unconstitutional. The Indiana Act and the Hawes-Cooper Act are printed herein as Appendix A and Appendix B.

The Purpose of the Action.

As already observed from the foregoing complaint, the purpose of the action is to have declared unconstitutional the acts of the various defendant states above referred to as being in violation of Subdivision 3 of Section 8 of Article 1 of the Constitution of the United States which provides that the Congress shall have power "To regulate

commerce with foreign nations, and among the several states, and with the Indian tribes"; and to have the Hawes-Cooper Act declared unconstitutional on the same ground and also on the ground that it violates the Tenth Amendment to the Constitution of the United States which provides that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

II.

PROPOSITIONS RELIED ON.

Proposition I.

THE BILL OF COMPLAINT SHOWS UPON ITS FACE A MISJOINDER OF CAUSES OF ACTION AND OF DEFENDANTS.

Proposition II.

NO CONSTITUTIONAL RIGHT GUARANTEED TO THE STATE OF ALABAMA BY THE CONSTITUTION OF THE UNITED STATES IS VIOLATED OR THREATENED WITH VIOLATION BY THE ACTS ALLEGED IN THE BILL OF COMPLAINT SOUGHT TO BE FILED.

Proposition III.

THE EFFECT OF THE BILL OF COMPLAINT IS TO INVADE THE SOVEREIGNTY OF THE STATE OF INDIANA IN THE CONSTITUTIONAL EXERCISE OF ITS INTERNAL AFFAIRS AND TO RESTRAIN IN STATE COURTS THE ENFORCEMENT OF STATE LAWS CRIMINAL IN EFFECT.

Ex parte Young, 209 U. S. 123, at p. 161.

PROPOSITION IV.

NO JUSTICIABLE CONTROVERSY BETWEEN STATES IS PRESENTED BY THE BILL OF COMPLAINT.

Louisiana v. Texas, 176 U. S. 1, at p. 16.

POINTS AND AUTHORITIES.

Proposition I Analyzed

Point 1.

The bill of complaint in this case does not state a joint cause of action. The statutes relating to the sale of convict-made goods vary in the different states from absolute prohibition of such sale in the open market in some states to regulatory statutes enacted under the police power (as in the case of Indiana) in other states.

Bill of Complaint, pp. 29-73;
The Indiana Statutes, Bill of Complaint, pp. 42-48.

Point 2.

No joint action or enforcement of the several laws above referred to is alleged to warrant the joining of the defendants.

Proposition II Analyzed

Point 1.

(a) The Hawes-Cooper Act is a legitimate exercise of the authority conferred upon the Congress by paragraph 3, section 8 of article I of the United States Constitution which, among other things, provides that "The Congress shall have power * * * to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

In re Rahrer, 140 U. S. 545, at p. 561;
Lottery Case, 188 U. S. 321, at p. 357, et seq.;
Adams Express Co. v. Kentucky, 238 U. S. 190, at p. 197;

Rhodes v. Iowa, 170 U. S. 412, 420 (1898);
Clark Distilling Co. v. Western Md. R. R. Co., 242 U. S. 311 (1917);
Silz v. Hesterberg, 211 U. S. 31 (1908);
Hipolite Egg Co. v. U. S., 220 U. S. 45;
Florida v. Mellon, 273 U. S. 12.

(b) The principle underlying and sustaining the Hawes-Cooper Act as a valid exercise of the authority conferred upon the Congress by the Commerce Clause of the Constitution is identical with the principle and authority upon which the Wilson Act of 1890 was sustained in In re Rahrer, supra.

(c) The uniformity of operation of the Hawes-Cooper Act is not affected by variations in the state laws governing the dealing in prison-made goods.

In re Rahrer, 140 U. S. 545, at p. 561;
Adams Express Co. v. Kentucky, 238 U. S. 190, at p. 197.

Point 2.

(a) The Hawes-Cooper Act does not violate the Tenth Amendment to the United States Constitution. If, as already shown, the act is a valid exercise of the power of the Congress in regulating interstate commerce, its incidental operation as a police measure does not violate the Tenth Amendment reserving to the states or to the people the powers not delegated to the United States.

Lottery Case, 188 U. S. 321, at p. 357;
Hamilton v. Kentucky Distilleries & W. Co., 251 U. S. 146, at p. 156.

Point 3.

(a) The Fourteenth Amendment to the Constitution of the United States does not encompass the State of

Alabama as such within its protection, and the due process or equal protection clauses thereof may not be availed of by the State of Alabama.

Scott v. Frazier, 256 Fed. 669, 671. (Decided, 1920, on another point in 253 U. S. 243);
Albright v. Bd. of Commrs., 194 Pac. 913 (1921), Kansas.

Point 4.

(a) Chapter 269 of the Acts of the General Assembly of Indiana of 1933 does not violate the constitutional provisions referred to in the complaint. It is not a regulation of commerce between the states and does not purport to be such.

Bill of Complaint, Appendix A, p. 47;
Bill of Complaint, Appendix B, p. 77;
In re Rahrer, 140 U. S. 545, at p. 561.

(b) The provisions of Chapter 269 of the Acts of 1933 of Indiana, with the exception of governmental use, place no greater degree of restriction upon the sale in Indiana of Alabama prison-made goods than upon those of Indiana or other states.

Point 5.

The State of Alabama has no absolute right to insist upon the filing of this complaint where it appears that the same must be dismissed if allowed to be filed and that its deficiencies are inherent in the subject-matter so that they can not be overcome by amendment. The State of Alabama can not by amendment of its complaint after filing change the laws which it attacks as unconstitutional.

III.

ARGUMENT.

I. MISJOINDER: It is submitted, first of all, that the Bill of Complaint shows upon its face a misjoinder of causes of action and of defendants. This is obvious. There is no allegation of joint action of the several defendant States in the *enactment* of the laws whose enforcement plaintiff seeks to have enjoined. There is no allegation of joint action threatened in the *enforcement* of these laws. Moreover, the laws themselves are different in their characteristics. What the plaintiff seeks is eighteen different injunctions against eighteen different States in a single action. This surely can not be permitted under Equity Rule No. 26.

II. NO CONSTITUTIONAL RIGHT VIOLATED: The Hawes-Cooper Act is a legitimate exercise of the authority conferred upon the Congress by paragraph 3, section 8 of article 1 of the United States Constitution providing that "The Congress shall have power • • • to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

The disposition by the states of prison-made goods in competition with goods produced by free labor is obviously related to the general welfare and the regulation thereof is clearly within the police power of the states. The issue is not met by the allegation of the Bill of Complaint that the goods produced by prison labor are no different from similar goods produced by free labor. The regulations by the various defendant states are not based upon an inherent difference *in the goods themselves* BUT UPON THE FACT THAT THE PUBLIC WELFARE IS VITALLY AFFECTED by their sale in competition with goods produced by free labor. The acts under con-

sideration do not seek to regulate the production of prison-made goods. The regulation applies to their sale in competition with like goods produced by free labor.

The Hawes-Cooper Act provides simply that prison-made goods shall upon arrival and delivery in any State or Territory "be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise."

It is the same situation as was present in the case of In re Rahrer, 140 U. S. 545, sustaining the Wilson Act of 1890. In upholding the Wilson Act, this court in its opinion in the above case used the following language on pages 560 and 561:

> "It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a State. This being so, it is urged that the act of Congress cannot be sustained as a regulation of commerce, because the Constitution, in the matter of interstate commerce, operates *ex proprio vigore* as a restraint upon the power of Congress to so regulate it as to bring any of its subjects within the grasp of the police power of the State. In other words, it is earnestly contended that the Constitution guarantees freedom of commerce among the States in all things, and that not only may intoxicating liquors be imported from one State into another, without being subject to regulation under the laws of the latter, but that Congress is powerless to obviate that result.
>
> "Thus the grant to the general government of a

power designed to prevent embarrassing restrictions upon interstate commerce by any State, would be made to forbid any restraint whatever. We do not concur in this view. In surrendering their own power over external commerce the States did not secure absolute freedom in such commerce, but only the protection from encroachment afforded by confiding its regulation exclusively to Congress.

"By the adoption of the Constitution the ability of the several States to act upon the matter solely in accordance with their own will was extinguished, and the legislative will of the general government substituted. No affirmative guaranty was thereby given to any State of the right to demand as between it and the others what it could not have obtained before; while the object was undoubtedly sought to be attained of preventing commercial regulations partial in their character or contrary to the common interests. And the magnificent growth and prosperity of the country attest the success which has attended the accomplishment of that object. But this furnishes no support to the position that Congress could not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question. In so doing Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt state laws. *It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property.*" (Our italics.)

Upon the same basis and for the same reasons Congress "has taken its own course" in enacting the Hawes-Cooper Act "and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws dealing with such property."

Again on page 562 the court said:

> "No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so."

Again on the same page the court, in sustaining the Wilson Act, used the following language:

> "We recall no decision giving color to the idea that when Congress acted its action would be less potent than when it kept silent.
>
> "The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge. The matter of that disposition brought into determination upon this record involves no ground for adjudging the act of Congress inoperative and void."

The same principle was adhered to by the court in sustaining the Webb-Kenyon Act of 1913 in Clark Distilling Co. v. Western Md. R. R. Co., 242 U. S. 311. Other authorities are cited on page 19, supra. Clearly the Hawes-Cooper Act does not violate the Interstate Commerce Clause of the United States Constitution as is abundantly shown by the authorities.

Nor does it violate the Tenth Amendment. Since it has been enacted pursuant to the express authority conferred by Section 8 of Article 1 of the Constitution, its incidental operation as a police measure does not violate the Tenth Amendment reserving to the States or to the people the powers not delegated to the United States. This has been settled by the authorities.

> Lottery Case, 188 U. S. 321, at p. 357;
> Hamilton v. Kentucky Distilleries & W. Co., 251 U. S. 146, at p. 156.

Note the language of the court in the case last cited, supra, on page 156. The court said:

> "That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accompliah a similar purpose."

For the reasons already given in the discussion of the constitutionality of the Hawes-Cooper Act, it follows that the various acts of the defendant States which are attacked as being regulations of interstate commerce are not in any sense regulations of interstate commerce. Congress has regulated interstate commerce in the enactment of the Hawes-Cooper Act. The States, exercising their police power, have regulated the sale of prison-made goods only after they have ceased to be in interstate commerce.

> In re Rahrer, 140 U. S. 545, at p. 561.

Moreover the provisions of the Indiana Act (Chapter 269 of the Acts of 1933), with the exception of governmental use, place no greater degree of restriction upon the sale in Indiana of Alabama prison-made goods than upon those of Indiana or other states.

The applicability of the above argument at this point lies in the fact that the plaintiff State of Alabama has no *absolute* right to file its complaint herein in this court. It must first obtain leave, and no useful purpose can be served by granting leave where it appears as in this case, that the Bill of Complaint would immediately be subject to dismissal, *not because of deficiencies which could be corrected by amendment* but BECAUSE OF INHERENT DEFICIENCIES WHICH CAN NOT BE OVERCOME BY AMENDMENT. The Bill of Complaint attacks the constitutionality of certain laws and seeks injunctions enjoining their enforcement. Those laws can not be changed by the plaintiff. Its Bill of Complaint does not admit of any change which can affect the vital questions which the plaintiff seeks to present. We think, therefore, since it is apparent that if leave is given and the Bill of Complaint filed, that it must be dismissed, that leave ought not to be given at all.

III. THE BILL OF COMPLAINT INVADES THE SOVEREIGNTY OF THE STATE OF INDIANA IN THE ENFORCEMENT OF ITS CRIMINAL LAWS:

At this point we desire to call attention to the fact that the effect of the Bill of Complaint sought to be filed is to invade the sovereignty of the State of Indiana by enjoining the enforcement of its criminal laws enacted in the constitutional exercise of its right to regulate its internal affairs. This may not be done under the allegations of this bill of complaint.

Ex parte Young, 209 U. S. 123, at p. 161.

The statement of the above proposition suggests at once the validity of Proposition IV, which we desire to discuss briefly.

IV. NO JUSTICIABLE CONTROVERSY BETWEEN STATES IS PRESENTED: As above stated the effect of the Bill of Complaint is to enjoin the enforcement of certain criminal laws of the defendant States enacted pursuant to the retained police power of such States. The defendant States are not the real parties defendant. If such laws are to be enforced they must be enforced by certain officers of said States who are not named in the Bill of Complaint and whose official positions as a matter of course would differ in the various States. The situation suggested here reflects an added reason in support of our claim of *misjoinder*.

But there is no justiciable controversy between the State of Alabama and the officers of the various defendant States who under State laws are charged with the enforcement of the State statutes attacked in the bill of complaint.

Louisiana v. Texas, 176 U. S. 1, at p. 18.

In conclusion we desire to call the attention of the court to the following further consideration. It is the theory of the plaintiff that it has acquired a *property right* in its prison-made goods which the Hawes-Cooper Act and certain laws of the defendant States threaten to depreciate or destroy and that its sovereign powers of government are diminished thereby. See page 10, paragraph 4, of the Bill of Complaint and page 14 of this brief. What are the "sovereign powers of government" which are diminished? Its possession and ownership of the products of its prison labor are the result of its own exercise of the police power. The only property inter-

est, if any, which it seeks to protect is the right to have such goods so acquired to move freely in interstate commerce. Another question arises after such goods come into the possession and ownership of individuals, but we do not think that the State of Alabama as a sovereign State may thus extend its police power to the curtailment of the undoubted police power of another State of the United States. This is another reason which, we think, shows that the controversy here, in so far as it can be claimed that it is a controversy between States, is a controversy over the exercise of the police power by the respective States. Such a controversy is not justiciable. Each State may exercise that power to its fullest extent within its own jurisdiction, but not beyond it.

It is respectfully submitted that the motion for leave to file the Bill of Complaint should be denied.

Respectfully submitted,

PHILIP LUTZ, JR.,
Attorney General of Indiana,

JOSEPH W. HUTCHINSON,
Assistant Attorney General of Indiana,
Attorneys for Defendant,
State of Indiana.

APPENDIX A.

THE INDIANA ACT.

Section 1. *Be it enacted by the General Assembly of the State of Indiana,* That all goods, wares and merchandise manufactured, produced or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institution, transported into the State of Indiana and remaining therein for use, consumption, sale or storage shall, upon arrival and delivery in the State of Indiana, be subject to the operation and effect of the laws of the State of Indiana to the same extent and in the same manner as though such goods, wares and merchandise had been manufactured, produced or mined in the State of Indiana by inmates of the Indiana Reformatory, of the Indiana State Prison or of the Indiana State Farm; and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

Sec. 2. This act shall take effect on the 19th day of January, 1934.

APPENDIX B.

THE HAWES-COOPER ACT.

Chap. 79.—An Act.

To divest goods, wares and merchandise manufactured, produced or mined by convicts or prisoners of their interstate character in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all goods, wares and merchandise manufactured, produced or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in federal penal and correctional institutions for use by the federal government, transported into any State or Territory of the United States and remaining therein for use, consumption, sale or storage shall, upon arrival and delivery in such State or Territory, be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares and merchandise had been manufactured, produced or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

Sec. 2. This act shall take effect five years after the date of its approval.

Approved January 19, 1929.

PROOF OF MAILING COPY OF BRIEF.

State of Indiana,
County of Marion, } ss:

Joseph W. Hutchinson, being first duly sworn on his oath, states that on the twenty-seventh day of December, 1933, he deposited in the United States Post Office in the city of Indianapolis, Indiana, in a sealed envelope with postage prepaid by registered mail, a true printed copy of the foregoing brief, addressed to Thomas E. Knight, Jr., Attorney General of Alabama, Attorney General's Office, Montgomery, Alabama.

JOSEPH W. HUTCHINSON.

Subscribed and sworn to before me this twenty-seventh day of December, 1933.

VIRGINIA THORBAHN,
Notary Public.

My commission expires January 16, 1937.

FILE COPY

No.....Original.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

STATE OF ALABAMA,
Plaintiff,

vs. In Equity

STATE OF ARIZONA, et al.,
Defendants.

BRIEF OF DEFENDANTS ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

RAYMOND T. NAGLE,
Attorney General,

JEREMIAH J. LYNCH,
Assistant Attorney General,

Solicitors for the State of Montana and appearing with William A. Schnader, Attorney General of Pennsylvania, on behalf of other defendant states mentioned within.

SUBJECT INDEX

Page

I. Preliminary Statement—If it appears upon this hearing that plaintiff cannot prevail upon merits, leave to file complaint should be denied 1

II. Questions Involved: (a) Did Congress have the power to enact the Hawes-Cooper Act, and (b) Are the several state laws involved within the police power of the States? 3

III. Did Congress have the power to enact the Hawes-Cooper Act? 3

A. Not a delegation of power or regulation of commerce 3

1. The Rahrer Case 3

2. Hawes-Cooper Act distinguished from Child Labor act and other acts 7

B. Regulation of interstate commerce in prison-made goods would be proper exercise of Congressional power 10

1. Power of Congress to regulate interstate commerce 10

a. Power to regulate includes power to prohibit 11

2. Prison-made goods will meet standards prescribed by this court for valid subject of regulation 12

a. Unrestricted sale of prison-made goods does result in harm or evil and causes demoralizing effect in state of destination 14

IV. Prohibition of the sale of prison-made goods is within the police power of the state 19

A. Wisdom or expediency of legislation is for the legislature 24

V. The police power of plaintiff 25

VI. Conclusion 25

TABLE OF CASES

	Page
Adams Express Co., West Virginia v. 219 Fed. 794	11
Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. Ed. 136	11
Alabama, Bailey v., 55 L. Ed. 191, 219 U. S. 219	8
Ames, Champion v., 188 U. S. 321, 47 L. Ed. 492	5, 11
Arneson v. Shary, 32 S. W. (2d) 907	20
Associated Oil Co. v. People, 294 Pac. 717	20
Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. Ed. 995	11
Atlantic Coast Line R. Co. v. City of Goldsboro, 232 U. S. 548, 58 L. Ed. 721	21
Aydlett v. Elizabeth City, 161 S. E. 78	21, 22
Bailey v. Alabama, 219 U. S. 219, 55 L. Ed. 191	8
Bennett v. United States, 194 Fed. 630	11
Bond v. Hume, 243 U. S. 15, 61 L. Ed. 565	25
Brooken v. State, 143 Pac. 479	21
Brooks v. United States, 267 U. S. 432, 69 L. Ed. 699 37 A. L. R. 1407	7, 11, 12
Burden v. Matter of Wulfsohn, 241 N. Y. 288	20
Champion v. Ames, 188 U. S. 321, 47 L. Ed. 492	5, 11
City of Goldsboro, Atlantic Coast Line R. Co. v. 232 U. S. 548, 58 L. Ed. 721	21
City of Oxford v. Marrs, 24 Fed. (2d) 541	21
City of Tacoma v. Fox, 290 Pac. 1010	20
Clark Distilling Company v. Western Maryland Ry. Co., 242 U. S. 311, 61 L. Ed. 326	5, 9
Crenshaw, Pabst Brewing Co. v., 198 U. S. 17, 49 L. Ed. 925	5
Dagenhart, Hammer v., 247 U. S. 251, 62 L. Ed. 1101, 3 A. L. R. 649	7
Delamenter v. South Dakota, 205 U. S. 93, 51 L. Ed. 724	5
Donald, Scott v., 165 U. S. 58, 41 L. Ed. 632	5
E. C. Warner Co. v. W. B. Foshay Co., 57 Fed. (2d) 656	22, 25
Elizabeth City v. Aydlett, 161 S. E. 78	21, 22
Ex Parte Tindall, 229 Pac. 125	20
Foshay, W. B. Co., E. C. Warner Co. v., 57 Fed. (2d) 657	22, 25

TABLE OF CASES (Continued)

	Page
Fox v. City of Tacoma, 290 Pac. 1010	20
Freed, Webster v., 239 U. S. 325, 60 L. Ed. 308	13
Geest v. State, 225 N. W. 709	20
Gibbons v .Ogden, 9 Wheat. 1, 6 L. Ed. 23	11
Gill v. Wilder, 116 So. 870	21
Glouster Ferry Co., v. Pennsylvania, 114 U. S. 196, 215, 29 L. Ed. 158, 166, 1 Intera. Com. Rep. 382, 5 Sup. Ct. Rep. 826	13
Gonzales v. People of Porto Rico, 51 Fed. (2d) 61	24
Guilford v. State, 219 N. W. 770	21
Hammer v. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101 3 A. L. R. 649	7, 12
Haskell v. Noble State Bank, 219 U. S. 104, 55 L. Ed. 122	20
Hawkins, People v., 51 N. E. 257, 157 N. Y. 1	23
Hesterberg, People ex rel. v., 76 N. E. 1032, Aff., 211 U. S. 31, 53 L. Ed. 75	5, 6, 22
Hipolite Egg Co. v. U. S., 220 U. S. 45, 55 L. Ed. 364, 31 Sup. Ct. Rep. 364	13
Hume, Bond v., 243 U. S. 15, 61 L. Ed. 565	25
In Re the Opinion of the Justices, 159 N. E. 55	22
Iowa, Rhoades v., 170 U. S. 412, 42 L. Ed. 1088	5
Iowa v. Slimmer, 248 U. S. 115, 63 L. Ed. 158	2
James Clark Distilling Co. v. Western Maryland Ry. Co. 242 U. S. 211, 61 L. Ed. 326	5, 9
John Doe v. People, 166 N. E. 112	20
Johnson, Mississippi v., 4 Wall. 475, 18 L. Ed. 437	2
Kansas City, St. Andrew Soc. v., 58 Fed. (2d) 593	20
Kirkwood, Sligh v., 237 U. S. 52, 59 L. Ed. 835	11, 20
LaFetra v. People, 130 N. E. 610	21
Liebman, New State Ice Co. v., 285 U. S. 62, 76 L. Ed. 747	16
Lockey v. State, 152 S. E. 693	20
Louisville & N. R. Co., v. White County, 172 N. E. 22	20
Lynch, Purity Extract & T. Co. v., 226 U. S. 192, 57 L. Ed. 184	8
Marrs v. City of Oxford, 24 Fed. (2d) 541	21
Massachusetts, Plumley v., 155 U. S. 461, 39 L. Ed. 223	5, 22
Matter of Wulfsohn v. Burden, 241 N. Y. 288	20

TABLE OF CASES (Continued)

Page

Mayor of Pocomoke City v. Standard Oil Co., 159 Atl. 902 21
Minnesota v. Northern Securities Co., 184 U. S. 199, 46 L. Ed. 499 2
Mississippi v. Johnson, 4 Wall. 475, 18 L. Ed. 437 2

New Orleans, Schick v., 49 Fed. (2d) 870 21
New State Ice Co. v. Liebman, 285 U. S. 62, 76 L. Ed. 747 16
New York ex rel. Silz v. Hesterberg, 76 N. E. 1032, 211 U. S. 31, 53 L. Ed. 75 22
Noble State Bank v. Haskell, 219 U. S. 104, 55 L. Ed. 122 20
Northern Securities Co., Minnesota v., 184 U. S. 199, 46 L. Ed. 400 2
Northern Securities Co. v. United States, 193 U. S. 197, 48 L. Ed. 679 11

Ogden, Gibbons v., 9 Wheat. 1, 6 L. Ed. 23 11

Pabst Brewing Co. v. Crenshaw 198 U. S. 17, 49 L. Ed. 925 5
Pacific Express Co., Rosenberger v., 241 U. S. 48, 60 L. Ed. 880 5
Pennsylvania, Gloucester Ferry Co. v., 114 U. S. 196, 215, 29 L. Ed. 158, 166, I Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826 13
Pennsylvania, Schollenberger v., 171 U. S. 1, 43 L. Ed. 49 5
People v. Associated Oil Co., 294 Pac. 717 20
People v. Hawkins, 51 N. E. 257, 157 N. Y. 1 23
People ex rel Silz v. Hesterberg, 76 N. E. 1032, aff. 211 U. S. 31, 53 L. Ed. 75 ..... 5, 6
People v. John Doe, 166 N. E. 112 20
People v. LaFetra, 130 N. E. 601 21
People of Porto Rico, Gonzalez v., 51 Fed. (2d) 61 24
Philadelphia, Atlantic & P. Teleg. Co. v., 190 U. S. 160 47 L. Ed. 995 11
Pittsburg, C., C., & St. L. Ry. Co. v. State 102 N. E. 25 24
Plumley v. Massachusetts, 155 U. S. 461, 39 L. Ed. 223 5, 22
Purity Extract & T. Co. v. Lynch, 226 U. S. 192, 57 L. Ed. 184 ..... 8, 23

Rahrer, Wilkerson v., 140 U. S. 545, 35 L. Ed. 572 4, 6, 9, 21
Rhodes v. Iowa, 170 U. S. 412, 42 L. Ed. 1088 5
Rosenberger v. Pacific Express Co. 241 U. S. 48, 60 L. Ed. 880 5

TABLE OF CASES (Continued)

	Page
St. Andrew Soc. v. Kansas City, 58 Fed. (2d) 593	20
Schnieders v. Town of Pocahontas, 234 N. W. 207	22
Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. Ed. 49	5
Shary, Arneson v., 32 S. W. (2d) 907	20
Shepard, Simpson v., 230 U. S. 352, 57 L. Ed. 1511	11
Schick v. New Orleans, 49 Fed. (2d) 870	21
Scott v. Donald, 165 U. S. 58, 41 L. Ed. 632	5
Simpson v. Shepard, 230 U. S. 352, 57 L. Ed. 1511	11
Sligh v. Kirkwood, 237 U. S. 52, 59 L. Ed. 835	11, 20
Slimmer, Iowa v. 248 U. S. 115, 63 L. Ed. 158	2
South Dakota, Delamenter v., 205 U. S. 93, 51 L. Ed. 724	5
Standard Oil Co. v. Mayor of Pocomoke City, 159 Atl. 902	21
State v. Brooken, 143 Pac. 479	21
State v. Geest, 225 N. W. 709	20
State v. Guilford, 219 N. W. 770	21
State v. Lockey, 152 S. E. 693	20
State, Pittsburg C., C., & St. L. Ry. Co. v., 102 N. E. 25	24
Town of Pocahontas v. Schneiders, 234 N. W. 207	22
United States, Addyston Pipe & Steel Co. v., 175 U. S. 211, 44 L. Ed. 136	11
United States, Bennett v., 194 Fed. 630	11
United States, Brooks v., 267 U. S. 432, 69 L. Ed. 699, 37 A. L. R. 1407	7, 11, 12
U. S., Hipolite Egg Co. v., 220 U. S. 45, 55 L. Ed. 364, 31 Sup. Ct. Rep. 364	13
United States, Northern Securities Co. v, 193 U. S. 197, 48 L. Ed. 679	11
Vance v., W. A. Vandercook Co., 170 U. S. 438, 42 L. Ed. 1100	5
Vandercook W. A. Co., Vance v., 170 U. S. 438, 42 L. Ed. 1100	5
W. B. Foshay Co. v. E. C. Warner Co., 57 Fed. (2d) 656	22, 25
Webster v. Freed 239 U. S. 325, 60 L. Ed. 308	13
Western Maryland Ry. Co., James Clark Distilling Co. v., 242 U. S. 211, 61 L. Ed. 326	5, 9
West Virginia v. Adams Express Co., 219 Fed. 794	11
White County v. Louisville & N. R. Co., 172 N. E. 22	20
Wilder v. Gill, 116 So. 870	21
Wilkerson v. Rahrer, 140 U. S. 545, 35 L. Ed. 572	4, 6, 9, 21

STATUTES AND CONSTITUTIONS.

	Page
Child Labor Act, 39 Stat. 765, c. 432	7
Hawes Cooper Act, 45 Stat. 1084, 49 U. S. C. A. §65	2, 3, 7, 10, 12, 14, 15
Lacey Act, 31 Stat. 187, U. S. Comp. Stat. 1901, p. 290	5
Webb-Kenyon Act, 37 Stat. 699, c. 90	9, 10
Wilson Act, 26 Stat. 313, c. 728	4, 5, 7, 9, 10
§209 National Industrial Recovery Act, approved June 16, 1933	12, 16
U. S. Constitution, Art. I, §8	18

TEXTS AND ENCYCLOPEDIAS

12 Corpus Juris, 60	11
12 Corpus Juris, 904	21
Cooley's Constitutional Limitations, 379	15
2 Cooley's Constitutional Limitations, 1223-1231	21
2 Cooley's Constitutional Limitations, 1232	22
Corwin, Cornell Law Quarterly, Vol. XVIII, No. 4, 477	12
Corwin, Cornell Law Quarterly, Vol. XVIII, No. 4, 503	19
T. J. Walsh, Congressional Record, Dec. 19, 1928, p. 865	19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No.....Original.

STATE OF ALABAMA,
Plaintiff,

vs.

STATE OF ARIZONA, et al.,
Defendants,

} In Equity

BRIEF OF DEFENDANTS ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

PRELIMINARY STATEMENT.

This brief contains only a definitely segregated portion of the argument on the motion for leave to file a bill of complaint. The Attorney General of Pennsylvania will discuss other objections separately.

The plaintiff has requested this Court to assume original jurisdiction by granting leave to file its proposed bill of complaint. Examination of cases in which leave to file was denied compels the conclusion that the Court will deny leave to file when it appears from the proposed pleading that the plaintiff cannot prevail in any event.

In *Iowa v. Slimmer,* 248 *U. S.* 115, 63 *L. Ed.* 158, the only effective relief sought was injunction against a probate court of Iowa from further administering an estate. Since the Court could not grant this relief, even upon the merits, leave to file the bill was denied.

In *Minnesota v. Northern Securities Co.,* 184 *U. S.* 199, 46 *L. Ed.* 499, it appeared there was want of proper parties defendant. These necessary parties being citizens of Minnesota, amendment joining them would defeat the jurisdiction of the court, therefore, leave to file was denied.

In *Mississippi v. Johnson,* 4 *Wall.* 475, 18 *L. Ed.* 437, the court would not grant leave to file the complaint because the plaintiff sought to enjoin the President of the United States from the performance of one of his official duties under a Reconstruction Act, which relief the Court could not grant in any event.

If, therefore, it appears without the necessity of taking evidence, that the *Hawes-Cooper Act* and the several state laws complained of are constitutional, then it will be impossible for the plaintiff to obtain the relief prayed for and the

Court properly may deny leave to file. Indeed, in such circumstance, further proceedings would trespass needlessly upon the time of the Court and would cause unnecessary expenditure of time and funds by the parties.

We assume (there having been no opportunity to examine plaintiff's brief at the time this brief went to press) that plaintiff has made an adequate statement of the case. For this reason we shall not attempt to summarize the complaint.

QUESTIONS INVOLVED.

The constitutionality of the laws attacked involves two questions: (a) Did Congress have the power under the commerce clause of the Constitution to enact the *Hawes-Cooper Act,* 45 *Stat.* 1084, 49 *U. S. C. A. Section* 65, and, (b) If so, did the defendant states have the right, under their police power, to enact the various measures set forth in Appendix A to the bill of complaint?

DID CONGRESS HAVE THE POWER TO PASS THE HAWES-COOPER ACT?

NOT A DELEGATION OF POWER OR A REGULATION OF COMMERCE.

THE RAHRER CASE.

The language and purpose of the *Hawes-Cooper Act,* subjecting prison-made goods to the jurisdiction of state law immediately upon their arrival and delivery within the boundaries of a state, whether or not in the original package, are almost identical with the language and purpose

of the *Wilson Act*, 26 *Stat.* 313, *c.* 728, which makes the same provision with reference to intoxicating liquor. Our entire case might well be submitted on the authority of *Wilkerson v. Rahrer*, 140 *U. S.* 545, 35 *L. Ed.* 572, in which the latter act was sustained. Referring to the enactment of the law, the Court said:

> "In so doing Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt state laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property."

Neither did Congress affirmatively seek to regulate commerce in intoxicating liquor. It ". . . simply removed an impediment to the enforcement of state laws in respect to imported packages in their original condition . . ."

> "No reason is perceived why," the Court said, "if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at any earlier period of time than would otherwise be the case, it is not within its competency to do so."

The principles enunciated in the *Rahrer case* have been repeatedly approved by the Court without equivocation or qualification.

Plumley v. Massachusetts, 155 U. S. 461, 39 L. Ed. 223;

Scott v. Donald, 165 U. S. 58, 41 L. Ed. 632;

Rhodes v. Iowa, 170 U. S. 412, 42 L. Ed. 1088;

Vance v. W. A. Vandercook Co., 170 U. S. 438, 42 L. Ed. 1100;

Schollenberger v. Pennsylvania, 171 U. S. 1, 43, L. Ed. 49;

Champion v. Ames, 188 U. S. 321, 47 L. Ed. 492;

Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 49 L. Ed. 925;

Delamater v. South Dakota, 205 U. S. 93, 51 L. Ed. 724;

Rosenberger v. Pacific Express Co., 241 U. S. 48, 60 L. Ed. 880;

James Clark Distilling Co. v. Western Maryland Ry. Co. 242 U. S. 211, 61 L. Ed. 326.

While not exactly in point, except on the question of police power, we call attention to the New York case of *People ex rel Silz v. Hesterberg*, 76 *N. E.* 1032, in which was considered the "*Lacey Act*," 31 *Stat.* 187, *U. S. Comp. Stat.* 1901, *p.* 290, which made provision with reference to dead game and game birds almost identically with the language of the Wilson Act.

Under a state law punishing importation of

game birds, defendant was indicted. It was objected in the New York Court that the state law was not a valid exercise of the police power, and that it interfered with the freedom of interstate and foreign commerce. These contentions were denied by the New York Court and the case was taken to the Supreme Court of the United States. The Supreme Court of the United States affirmed the New York Court (211 *U. S.* 31, 53, *L. Ed.* 75). It held that the Act was a valid exercise of the police power. Since the game in question had been imported from England, the decision was restricted to the effect of the law on foreign commerce. It is very significant, however, that the Court said:

> "The New York court of appeals further held that the so-called Lacey Act (31 Stat. at L. 187, chap. 553, U. S. Comp. Stat. 1901, p. 290) relieved the regulation of the objection in question because of the consent of Congress to the passage of such laws concerning such commerce, interstate and foreign, within the principles upon which th Wilson Act was sustained by this cou Rahrer (Wilkinson v. Rahrer) 140 U. 5, 35 L. Ed. 572, 11 Sup. Ct. Rep. 865.'

While there is no express approval of this holding by the New York Court, it would seem that in the absence of disapproval and because attention was expressly directed to it, the Supreme Court made reference to the point for the purpose of fortifying the decision upholding the act.

HAWES-COOPER ACT DISTINGUISHED FROM CHILD LABOR ACT AND OTHER ACTS.

The pleading herein is calculated to create the impression that plaintiff intends to rely largely on the *Child Labor case, Hammer v. Dagenhart,* 247 *U. S.* 251, 62 *L. Ed.* 1101, 3 A. L. R. 649, for success, and upon other decisions hereinafter mentioned which, it will be claimed, lay down the rule that Congress has no power to regulate any article of commerce which is not *per se,* obnoxious to the public welfare.

In all of these cases it will be observed the laws in question were not laws which merely divested commodities of their character as interstate commerce at a given point, but were laws which affirmatively forbade transportation in interstate commerce.

In the *Child Labor case* the Court held that the *Child Labor Act,* which forbade the transportation from one state to another of articles manufactured by child labor, was invalid because it really was not a regulation of interstate commerce, but was an attempt on the part of Congress to regulate labor in the state of origin by an embargo on its external trade. (*Brooks v. United States,* 267 *U. S.* 432, 69 *L. Ed.* 699, 37 *A. L. R.* 1407). *The Hawes-Cooper Act* is easily distinguishable from the *Child Labor Act.* Like the *Wilson Act,* it does not prohibit transportation, but does provide that the article or thing transported shall upon arrival and delivery in any state or territory be subject to the operation and

effect of the laws of such state or territory to the same extent as though manufactured, produced or mined therein.

Again, articles made by child labor and transported into other states are in themselves harmless and it may be assumed that such labor was adequately compensated. On the other hand, convict labor is a species of slave labor, which is not remunerated ordinarily, but the goods produced thereby often enter into competition with goods purchased by free labor, to the disadvantage, of course, of the latter. "There is no more important concern," as the Court so finely said in *Bailey v. Alabama,* 55 *L. Ed.* 191, 219 *U. S.* 219, "than to safeguard the freedom of labor upon which alone can enduring prosperity be based." The principle of the greatest good to the greatest number should have ready application here. Moreover, it can be truly said that convict-made goods are of an exceptional character, and that evil may sometimes be found in a thing, good of itself, because of its origin.

> *Purity Extract & T. Co. v. Lynch,* 226 *U. S.* 192, 57 *L. Ed.* 184.

The majority opinion in the *Child Labor case* asserts that the purpose of the Act was not to regulate commerce, but to standardize the ages at which children may be employed in mining and manufacturing within the states, thus equalizing competition; that there is no power vested in Congress *to require* the states to exercise their police power so as to prevent possible unfair

competition. No one can dispute the assertion that Congress may not *require* states to exercise their police power; but the statement implies that Congress may have the power to pass legislation *to permit* states to exercise their police power so as to prevent unfair competition, and thus confirms, without mentioning, the doctrine of the *Rahrer case.*

For the purpose of weakening the effect of the *Rahrer case* undoubtedly there will be cited the concluding sentence in *Clark Distilling Company vs. Western Maryland Ry. Co.,* 242 *U. S.* 311, 61 *L. Ed.* 326, which considered the constitutionality of the *Webb-Kenyon Act,* 37 *Stat.* 699, *c.* 90, which flatly prohibited shipment of intoxicating liquor into any state where it might be sold or used in violation of the law of such state. The court said:

> ". . . the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace."

It will be argued that, because the Court called attention to the "exceptional nature" of intoxicating liquors, the *Rahrer case* also must have rested upon the "exceptional nature" of the commodity dealt with in the *Wilson Act.* It must be remembered, however, that the doctrine of the *Rahrer case* was expressly approved in the *Clark Distilling Co. case,* and that the doctrine

of the *Rahrer case* was repeatedly approved by this and other courts. The *Rahrer case* and the many cases approving it did not rely upon the exceptional nature of intoxicating liquor, but it was only after twenty-six years had passed, when the Court was asked to sustain the *Webb-Kenyon Act,* which flatly prohibited transportation of intoxicating liquors to certain states, that the Court deemed it necessary to base its decision on the exceptional nature of the commodity. The Court did not rely wholly upon the *Rahrer case* because the *Webb-Kenyon Act* went much further than the *Wilson Act.* It not merely removed an impediment to the enforcement of the laws of the states, but imposed an absolute prohibition, hence the two acts were fundamentally dissimilar.

REGULATION OF INTERSTATE COMMERCE IN PRISON-MADE GOODS WOULD BE PROPER EXERCISE OF CONGRESSIONAL POWER.

We have stated that our case might rest upon the *Rahrer* decision, because the *Hawes-Cooper Act* does not attempt to regulate interstate commerce. But assuming that it does attempt to regulate interstate commerce, it is a valid subject for such legislation.

POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE.

The Constitution vests Congress with authority to regulate commerce among the several states. The power so given extends to every part of interstate commerce, and to every instrumentality

or agency by which it is carried on. It acknowledges no limitations within the Constitution and is as complete as that of a state over its domestic commerce.

Gibbons v. Ogden, 9 Wheat. 1, 6, L. Ed. 23;

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. Ed. 136;

Champion v. Ames, 188 U. S. 321, 47 L. Ed. 492;

Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. Ed. 995;

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. Ed. 679;

Simpson v. Shepard, 230 U. S. 352, 57 L. Ed. 1511;

Sligh v. Kirkwood, 237 U. S. 52, 59 L. Ed. 835;

THE POWER TO REGULATE INCLUDES THE POWER TO PROHIBIT.

It is now well settled that the power to regulate commerce between the states includes the power to prohibit it in certain instances.

Brooks v. United States, 267 U. S. 432, 69 L. Ed. 699, 37 A. L. R. 1407;

Bennett v. United States, 194 Fed. 630;

West Virginia v. Adams Express Co., 219 Fed. 794;

12 C. J. 60.

Upon the question of Congress's power to prohibit commerce, and for a most excellent discussion of the limitations of the rule in the *Child Labor case,* attention is called to a paper by *Edwin S. Corwin, Professor of Jurisprudence, Princeton University, in the Cornell Law Quarterly, Volume XVIII, No. 4, June,* 1933, *p.* 477. The article is too long and the treatment too closely knit to permit of quotation. Undoubtedly it was prompted by the passage of the *National Industrial Recovery Act,* but it might well have been written for the express purpose of clearing the atmosphere for the consideration of the *Hawes-Cooper Act.*

Even if the *Hawes-Cooper Act* can possibly be construed as an affirmative regulation of interstate commerce, Congress will find its justification in the decisions of this court.

PRISON-MADE GOODS WILL MEET STANDARDS PRESCRIBED BY THIS COURT FOR VALID SUBJECT OF REGULATION.

The majority opinion in *Hammer v. Dagenhart,* 247 *U. S.* 251, 62 *L. Ed.* 1101, *supra,* holds that the law was an attempt to regulate conditions of labor in the states of production, and this holding in turn is based upon the assumption that the articles produced were harmless in themselves. The majority opinion, it seems, admits that Congress might exclude from interstate commerce, articles the transportation of which is *followed* by "harmful results." In *Brooks v. United States,* 267 *U. S.* 432, 69 *L. Ed.* 699, 37

A. L. R. 1407, the Court considered an act forbidding any person from transporting a motor vehicle in interstate commerce, knowing the same to have been stolen. In rebutting the objection that the law was not within the power of Congress, the late Chief Justice Taft speaking for the Court said:

> "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, *or the spread of any evil or harm to the people of other states from the state of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce.* Gloucester Ferry Co. vs. Pennsylvania, 114 U. S. 196, 215, 29 L. Ed. 158, 166, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826." (Italics ours).

He further said:

> "In Hipolite Egg Co. vs. U. S. 220 U. S. 45, 55 L. Ed. 364, 31 Sup. Ct. Rep. 364, it was held that it was within the regulatory power of Congress to punish the transportation in interstate commerce of adulterated articles which if sold in other states from the one from which they were transported would deceive or injure persons who purchased such articles."

In *Webster v. Freed,* 239 *U. S.* 325, 60 *L. Ed.* 308, it was held that Congress might prohibit the importation of prize fight films designed for public exhibition because of the demoralizing

effect of such exhibition in the state of destination.

A stolen automobile is no more harmful, *per se*, than a lawfully possessed one. An adulterated article may be chemically pure and physically harmless. A prize fight film in itself is not obnoxious.

From the foregoing cases we may conclude that Congress may prohibit the transportation of articles not harmful, *per se*, if (1) the use of interstate commerce was necessary to the accomplishment of harmful results, (2) if the use of such commerce is an agency for the spread of any evil or harm to the people of other states, (3) if such articles might result in deception of or injuries to persons who purchased them, and (4) if the use of such articles for the purpose for which they were intended might cause a demoralizing effect in the state of destination.

Obviously, if evil or harm results to the people of a state from the importation of prison-made goods, then the interstate transportation of them was necessary to the accomplishment of such results.

DOES THE UNRESTRICTED SALE OF PRISON-MADE GOODS RESULT IN HARM OR EVIL OR CAUSE A DEMORALIZING EFFECT IN THE STATE OF DESTINATION?

It must be presumed that the *Hawes-Cooper Act* was passed to meet a condition which Congress found to exist, and for the purpose of remedying such evil. The same presumption

must attach to the acts of the legislative assemblies of the nineteen defendant states (*Cooley Constitutional Limitations, p.* 379.

Further, the Court will take judicial notice of the matters of common knowledge which have given rise to the legislation against prison-made goods. It is a matter of common knowledge that the crux of the problem lies in the fact that industries employing free labor required to pay taxes, interest on capital, and other items of overhead which are not included in the cost of prison-made goods, cannot compete successfully in price with prison-made goods. Prison-made goods can be sold to meet the lowest prices quoted in the market and when the market is saturated a profit still can be made at a price which is below the actual cost to the products of free labor.

From a social and economic standpoint, the unrestricted sale of prison-made goods is dangerous. The social and economic situation is identical with that which arose in connection with slave labor, which was largely responsible for the impoverishment of the so-called poor white who owned no slaves and who could not compete with those owned by others. Of course, convict labor is not likely ever to assume the proportions of slave labor, but the difference in its effect is one of degree and not one of economic principle.

It is a matter of common knowledge that long before the passage of the *Hawes-Cooper Act* an economic and social revolution was taking place

in the United States. Machines in the principal industries were replacing workers thirty to fifty per cent, or more. Even on the farms machines were taking the place of farm hands.

Because of this mass production and displacement of workers the ranks of unemployment have swollen to a point described by Mr. Justice Brandeis as "the greatest of our evils," and such unemployment is at least one of the causes of the great emergency with which we are faced. In his dissenting opinion in *New State Ice Co. vs. Liebman,* 285 *U. S.* 62, 76 *L. Ed.* 747, Mr. Justice Brandeis said:

> "The people of the United States are now confronted with an emergency more serious than war. Misery is widespread in a time not of scarcity but of overabundance. The long continued depression has brought unprecedented unemployment. . ."

So strong is the feeling that convict labor is a serious impediment to economic recovery that the very first provision of *Section* 206, *National Industrial Recovery Act,* concerning contractual conditions on behalf of labor, declares,

> "(1) that no convict labor shall be employed on any such project."

It is a matter of common knowledge that over eighty thousand prisoners are employed in the production of goods in the United States in competition with the products of free labor.

The complaint alleges (page 11), that in the

State of Alabama alone during the year 1932, 807 prisoners were employed in the cotton mills, 449 prisoners in a shirt factory, 253 in an underwear factory, and 1,050 on prison farms. For shirts made in the Alabama prison and shirts made elsewhere out of material manufactured in the prison there has been an annual sale of more than one-third of a million dollars (complaint p. 17). For the labor in producing these shirts the prisoner received 6¼¢ apiece (complaint p. 14).

Compelled to involuntary servitude, driven to perform a daily "task" of eighteen shirts (complaint p. 14) under pain of customary punishment for infraction of prison rules, 1,509 Alabama prisoners in the year 1932 displaced an approximate number of textile workers in various classes, 1,050 prisoners have thrown out of work a like number or have reduced the earnings of a greater number of cotton raisers and growers of potatoes.

The picture is graphic and like graphic pictures is not entirely accurate because it is impossible to trace in detail the number of men and hours of employment. Much of the loss may be in man-hours rather than total unemployed. Much of the loss may be in reduced wages. But there surely are a few persons whose unemployment is due directly to this cause. These unidentified unemployed, anonymous they must remain, serve to swell the great Army of the Unemployed whose continued existence threatens even national security. Some of them are in the

bread lines, others dependent on the national relief agencies, others live in the "jungles" beside the railroad tracks, and others in despair may be robbing to secure food for themselves and their families.

Such is the "harmful result" that may and indubitably must follow from the transportation into other states of prison-made goods; such is the "spread of evil or harm" to the people of other states through the agency of interstate commerce; if poverty and despair may be said to be demoralizing—as they are—such is the "demoralizing effect in the states of destination."

By common report hundreds of thousands of interested persons, particularly members of labor unions, under no circumstances would purchase convict-made goods if they were aware of their origin, because such purchase contributes to their own economic disaster. Can it not be said for those statutes which require proper labeling that failure to mark convict-made goods results in the "deception to persons who purchase them?" We submit that, measured by standards set up by this court, the traffic in prison-made goods is a matter wholly within the power of Congress to regulate if it sees fit.

In these circumstances, when considering the power of Congress to regulate commerce, its power to provide for the general welfare of the United States should not be forgotten. (*Constitution, Art. I, Sec.* 8). The effect of the traffic is not entirely local, but pervades the entire

United States. (*See Corwin, Cornell Law Quarterly, Vol. XVIII, No. 4, June,* 1933, *p.* 503).

If the contention of plaintiff be correct, the states may not prohibit the traffic because it is interstate commerce; Congress cannot prohibit the traffic because it has not the power. Can it be possible that neither the states nor Congress nor both of them acting concurrently can stop a practice which common knowledge tells us is harmful and which sound public policy, as evidenced by the acts of Congress and of the states, demands be controlled?

The power to prohibit the importation of convict made goods surely existed in its plenitude in the Colonies before the adoption of the Constitution. Nowhere in the Constitution does it appear that either the states or the Federal Government covenanted not to use this power (excepting as the commerce clause may be a covenant on the part of the states not to use this power). Where then has this power gone?

> "It is not possible," said the late Senator Thomas J. Walsh, "that part of the power which existed in its plenitude in the Colonies has gone out into thin air—has dissipated in the ether." (Congressional Record, Dec. 19, 1928, p. 865).

IS THE PROHIBITION OF THE SALE OF PRISON-MADE GOODS WITHIN THE POLICE POWER OF THE STATES?

The next inquiry then is, was it within the police power of the defendant states to enact the various statutes under attack in the bill

of complaint? What is meant by "police power" and to what does it extend? It is the power inherent in a state to enact laws to promote the order, safety, health, morals, prosperity and general welfare of society. It extends to all the great public needs and may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.

Noble State Bank v. Haskell, 219 U. S. 104, 55 L. Ed. 112;

Sligh v. Kirkwood, 237 U. S. 52, 59 L. Ed. 835;

St. Andrew Soc. v. Kansas City, 58 Fed. (2d) 593;

People v. John Doe, 166 N. E. 112;

Matter of Wulfsohn v. Burden, 241 N. Y. 288;

People v. Associated Oil Co. 294 Pac. 717;

Arneson v. Shary, 32 S. W. (2d) 907;

White County v. Louisville & N. R. Co., 172 N. E. 22;

Ex parte Tindall, 229 Pac. 125;

State v. Geest, 225 N. W. 709;

City of Tacoma v. Fox, 290 Pac. 1010;

State v. Lockey, 152 S. E. 693;

State v. Guilford, 219 N. W. 770;

People v. LaFetra, 130 N. E. 601;

Gill v. Wilder, 116 So. 870;

Elizabeth City v. Aydlett, 161 S. E. 78;

Schick v. New Orleans, 49 Fed. (2d) 870;

Marrs v. City of Oxford, 24 Fed. (2d) 541;

Mayor of Pocomoke City v. Standard Oil Co., 159 Atl. 902;

State v. Brooken, 143 Pac. 479;

12 C. J. 904;

2 Cooley's Constitutional Limitations, 1223-1231.

Discussing the subject in *Atlantic Coast Line R. Co. v. City of Goldsboro,* 232 *U. S.* 548, 58 *L. Ed.* 721, the Court said:

> "It is settled that neither the 'contract clause' nor the 'due process' clause has the effect of over-riding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all property and contract rights are held subject to its fair exercise."

Wilkerson v. Rahrer, 140 U. S. 545, 35 L. Ed. 572;

Plumley v. Massachusetts, 155 U. S. 461, 39 L. Ed. 223;

Elizabeth City v. Aydlett, 161 S. E. 78;

Schneiders v. Town of Pocahontas, 234 N. W. 207;

E. C. Warner Co. v. W. B. Foshay Co., 57 Fed. (2d) 656;

In re Opinion of the Justices, 159 N. E. 55;

2 Cooley's Constitutional Limitations, 1232.

The extent of the police power of a state finds forcible illustration in *New York ex rel. Silz v. Hesterberg,* 211 *U. S.* 31, 53 *L. Ed.* 75. The game laws of the state of New York prohibited the possession of certain game during the closed season, whether taken within or without the state. It appeared that Silz was charged with the possession of plover and grouse which had been lawfully taken abroad during the open season and had been lawfully brought into the state; that these game birds were varieties different from those known as plover and grouse in the State of New York; that, although of the same families, in form, size, color and markings, they could readily be distinguished from the latter; and that they were wholesome and valuable articles of food. In affirming the judgment of conviction, the court said:

"It is insisted that a method of inspection can be established which will distinguish the

imported game from that of the domestic variety, and prevent confusion in its handling and selling. That such game can be distinguished from domestic game has been disclosed in the record in this case, and it may be that such inspection laws would be all that would be required for the protection of domestic game. But, subject to constitutional limitations, the legislature of the state is authorized to pass measures for the protection of the people of the state in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted."

Purity Extract & T. Co. v. Lynch, 226 U. S. 192, 57 L. Ed. 184.

The only case we have been able to find which touches directly upon the right of the state under its police power to restrict or prohibit the sale of prison-made goods is that of *People v. Hawkins*, 51 *N. E.* 257, 157 *N. Y.* 1. In that case the defendant was indicted for having offered for sale a convict-made article not labeled as required by law.

O'Brien, J., delivering the majority opinion, affirming the judgment for defendant, held (a) that it was not within the police power of the state to restrict the sale of prison-made goods, and (b) that the act interfered with the freedom of interstate commerce. Not another one of the seven Justices taking part in the decision agreed with Mr. Justice O'Brien in his opinion that the law was not within the police power. Bartlett, J., dissented in an able opinion

sustaining the law as being within the exercise of the police power. Parker, C. J., dissented and concurred with Justice Bartlett. Gray, Martin and Vann, JJ., all concurred, but with the express notation that their concurrence was upon the ground that the statute conflicted with and was repugnant to the commerce clause of the Federal Constitution. They leave the questions of police power without comment, excepting such as may be implied from the rule *expressio unius est exclusio alterius*. Haight, J., concurred for reversal, without comment, but necessarily must have concluded the act to be within the police power.

THE WISDOM OR EXPEDIENCY OF LEGISLATION IS FOR THE LEGISLATURE.

The wisdom or expediency of legislation under the police power is as a rule a matter for the lawmaking body and not for the courts. Before courts will interfere with such legislation it must be so unreasonable that it is plain that no circumstances could justify it.

Pittsburg, C. C. & St. L. Ry. Co. v. State, 102 N. E. 25;

Gonzalez v. People of Porto Rico, 51 Fed. (2d) 61.

The reasons which prompted Congress to pass the Hawes-Cooper Act and which we have attempted to place before the Court, will readily lend support to the statutes under attack in this proceeding and justify their enactment. It

may be proper to add that the welfare of innocent men, women and children throughout the defendant states should come ahead of the welfare of Alabama's convicts, many of whom, doubtless, are hopeless enemies of society.

POLICE POWER OF PLAINTIFF.

Some slight reference is made in the bill of complaint to the police power of the plaintiff state. Of course, it can have no extra-territorial effect. The police power of any state is only operative within the bounds thereof.

Bond v. Hume, 243 U. S. 15, 61 L. Ed. 565;

E. C. Warner Co. v. W. B. Foshay Co., 57 Fed. (2d) 657.

CONCLUSION.

In conclusion, we submit that Congress had the power to enact the Hawes-Cooper Act and that the impediments due to conflict with interstate commerce having been removed, the states in the exercise of their police power validly enacted the statutes complained of.

This being true, the plaintiff cannot hope, even after trial, to obtain the injunctive relief which it seeks. Therefore, the Court properly may deny leave to file the bill of complaint.

Respectfully submitted,

RAYMOND T. NAGLE,
Attorney General of Montana.

JEREMIAH J. LYNCH,
First Assistant Attorney General of Montana.

WILLIAM A. SCHNADER,
Attorney General of Pennsylvania.

HARRIS C. ARNOLD,
Assistant Attorney General of Pennsylvania.

JOHN J. BENNETT, Jr.,
Attorney General of New York.

HENRY EPSTEIN, Solicitor General of New York.

ARTHUR T. LaPRADE,
Attorney General of Arizona.

U. S. WEBB,
Attorney General of California.

PAUL P. PROSSER,
Attorney General of Colorado.

BERT H. MILLER,
Attorney General of Idaho.

PHILIP LUTZ, Jr.,
Attorney General of Indiana.

EDWARD L. O'CONNOR,
Attorney General of Iowa.

BAILEY P. WOOTTON,
Attorney General of Kentucky.

PATRICK H. O'BRIEN,
Attorney General of Michigan.

HARRY H. PETERSON,
Attorney General of Minnesota.

WILLIAM A. STEVENS,
Attorney General of New Jersey.

DENNIS G. BRUMMITT,
Attorney General of North Carolina.

JOHN W. BRICKER,
Attorney General of Ohio.

I. H. VanWINKLE,
Attorney General of Oregon.

G. W. HAMILTON,
Attorney General of Washington.
*Solicitors for Respective Defendants.**

*It is understood that the Bill of Complaint has been or will be dismissed as to the State of Oklahoma.

NAEGELE PRINTING CO., HELENA, MON

FILE COPY

No.....Original.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1933

In Equity.

STATE OF ALABAMA, PLAINTIFF,

vs.

STATE OF ARIZONA, ET AL., DEFENDANTS.

SUPPLEMENTAL MEMORANDUM OF DEFENDANTS ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

RAYMOND T. NAGLE,
Attorney General.

Solicitor for the State of Montana and appearing with William A. Schnader, Attorney General of Pennsylvania, on behalf of other defendant states mentioned in our first brief.

THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

SUBJECT INDEX.

Page No.

I. The Lacey Act 1
II. The Hawes-Cooper Act 1
III. Distinguishing Wilson Act from Webb-Kenyon Act, mentioned in connection with page 9 of our first brief 2
IV. Origin of theory of Wilson Act 3
V. Public Policy as to restriction of sale of prison-made goods 4

TABLE OF CASES

Adams, Jonesboro *vs.* (Ark.) 174 S. W. 253 1
Bennett, Greenthal *vs.* (New York) not yet reported 1
Bowman *vs.* Chicago & Northwestern Ry. Co., 125 U. S. 465 3
Chicago & Northwestern Ry. Co., Bowman *vs.*, 125 U. S. 465 3
Donald, Scott *vs.*, 165 U. S. 58 3
Greenthal *vs.* Bennett, (New York) not yet reported 1
Hardin *vs.* Leisey, 135 U. S. 100 3
Hegler, State *vs.* (Mo.) 93 S. W. 253 1
Hennick, Stoutenberg *vs.*, 129 U. S. 141 3
James Clark Dist. Co. *vs.* West Md. Ry. Co., 242 U. S. 311 3
Jonesboro *vs.* Adams, (Ark.) 174 S. W. 253 1
Leisey, Hardin *vs.*, 135 U. S. 100 3
Lyng *vs.* Michigan, 135 U. S. 161 3
Michigan, Lyng *vs.*, 135 U. S. 161 3
Rahrer Wilkerson *vs.*, 140 U. S. 545 3
Scott *vs.* Donald, 165 U. S. 58 3
State *vs.* Hegler, (Mo.) 93 S. W. 253 1
Stoutenberg *vs.* Hennick, 129 U. S. 141 3
Western Md. Ry. Co., James Clark Dist. Co., *vs.*, 129 U. S. 311 3
Wilkerson *vs.* Rahrer, 140 U. S. 545 3

STATUTES.

	Page No.
Hawes-Cooper Act, 45 Stat. 1084, 49 U. S. C. A. 65	1
Webb-Kenyon Act, 37 Stat. 699, c. 90	2-3
Lacey Act, 31 Stat. 187, 18 U. S. C. A. 395	1
National Industrial Recovery Act, approved June 16, 1933	3
Wilson Act, 26 Stat. 313, c. 728	2-3
33 Stat. 435, c. 1759, 5 U. S. C. A. 367	4
42 Stat. 937, c. 356, Tit. III, Sec. 7	4
Ch. 26, Laws of 1933 of New York	3
Opinions of Attorney General.	
Wickersham to President Wilson, 30 Op. Atty. Gen. 88	3

No.....Original.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1933

In Equity.

STATE OF ALABAMA, PLAINTIFF,

vs.

STATE OF ARIZONA, ET AL., DEFENDANTS.

SUPPLEMENTAL MEMORANDUM OF DEFENDANTS ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

In conformity with our promise, made in open court, this supplementary memorandum is submitted.

Lacey Act.

In discussing decisions approving the "Lacey Act," 18 U. S. C. A. 395, on pages 5 and 6 of our first brief, note also:

State *vs.* Heger (Mo. 1906) 93 S. W. 253;
Jonesboro *vs.* Adams (Ark. 1915) 174 S. W. 527.

Hawes-Cooper Act.

As authority on the validity of the *Hawes-Cooper Act* we quote the memorandum in Harry Greenthal *vs.* John J. Bennett, Jr., as Attorney General, Supreme Court, Albany County, New York, decided January 5, 1934, the only case in which this question has been decided.

> "LOUGHRAN, J.—The Act of Congress is assailed as an attempt (1) to delegate to the states the exclusive federal power over interstate commerce; or (2) to control production of innocuous goods so as to equalise competition in industry. I am of the opinion that the

basis to neither objection inheres in the act. Congress may affirmatively assent to an exercise of state police power otherwise valid, although interstate commerce is thereby limited (*In re Rahrer*, 140 U. S. 545). Control of the disposition of prison made goods in one state (if a legitimate end of the police power there) is not essentially the regulation of their production in another state (cf. Hammer *vs.* Dagenhart, 247 U. S. 251).

The New York statute is challenged as obnoxious to the due process clauses. That challenge, I think, is invalid. It is the policy of the state, as declared by the statute, "to protect free labor from the unjust competition of convict labor,"—a policy persistently asserted for more than a generation (L. 1894, ch. 698; L. 1928, ch. 805). It is sound to keep convicts at work. The products of free labor must be marketed at a profit. If there be conflict between these objectives, the choice was for the legislature (Barbier *vs.* Connolly, 113 U. S. 27; Noble State Bank *vs.* Haskell, 219 id. 104; Central Lumber Co. *vs.* South Dakota, 226 id. 157, 160). The cases cited by plaintiff (People *vs.* Hawkins, 157 N. Y. 1; People *vs.* Raynes, 136 App. Div. 417; aff'd, 198 N. Y. 539, 662) are not here controlling. In the *Hawkins* case only one member of the court took the position that the legislation there reviewed amounted to a denial of due process. Final determination of the *Raynes* case also turned on the commerce clause (198 N. Y. 622).

Judgment for the defendant."

The court directs attention to the fact that section 1 of the New York Act under attack (Ch. 26, Laws of 1933 of New York) makes a specific declaration that the law is enacted "in order to protect free labor from the unjust competition of convict labor." The entire law is set out on page 3 of the return of New York State to the order to show cause herein.

Distinguishing Wilson Act from Webb-Kenyon Act, Mentioned in Connection with Page 9 of Our First Brief.

We have argued that the Webb-Kenyon Act directly prohibits movement of certain goods in interstate commerce, while the Wilson Act does not, and that this is a fundamental dissimilarity justifying a different rule.

This distinction was recognized by Attorney General Wickersham in his opinion upon the Webb-Kenyon Act to President Wilson (30 Op. Atty. Gen. 88) and formed the basis for his belief that the act was unconstitutional. The court in the *Clark Distilling Company* case was fully aware of the distinction and mentions the opinion of the Attorney General.

Origin of Theory Behind Wilson Act.

We stated that the theory of the Wilson Act originated in the opinions of this court. Attorney for the appellant in *In re Rahrer*, 140 U. S. 545, asserts in his brief that the Wilson Act was the direct result of statements by the court in Leisy *vs.* Hardin, 135 U. S. 100. That brief, of course, was written within a few months after the enactment of the Wilson Act. In Scott *vs.* Donald, 165 U. S. 58, the court says that the Wilson Act perhaps was the result of suggestions by the court in the Leisy case.

We shall not burden the court with quotations. A direct suggestion that Congress may remove restrictions upon a state in dealing with imported articles before they became mingled with the common mass is made on page 123 of the 135th U. S. (Leisy Case). Implied suggestions will be found on pages 108, 110, 119, 124 and 125.

Implied suggestions of the same import appear in:

Bowman *vs.* Chicago & Northwestern Ry Co., 125 U. S. 465, 485, (1888);
Lyng *vs.* Michigan, 135 U. S. 161, (1890);
Stoutenberg *vs.* Henniek, 129 U. S. 141, 148, (1889).

The last mentioned case did not concern intoxicating liquors solely but considered a licensing law relating to persons soliciting sale of goods on behalf of persons doing business in another state.

Public Policy as to Restriction of Sale of Prison Made Goods.

As cumulative evidence of soundness of public policy in regulation or prohibition of the sale of prison-made goods, we desire to cite in addition to the National Industrial Recovery Act on page 16 of our first brief, the following:

33 Stat. 435, c. 1759, 5 U. S. C. A. 367, a law enacted in 1904 providing that no contract shall be entered into by the post office department for purchase of material or supplies to be manufactured by convict labor.

42 Stat. 937, c. 356, Tit. III, Sec. 7, a provision prohibiting the importation of convict made goods from foreign countries.

These statutes are quoted and discussed on pages 10 and 11, supplemental brief of the State of Wisconsin.

Respectfully submitted,

RAYMOND T. NAGLE,

Attorney General of Montana, on behalf of defendants represented in our first brief.

INDEX TO BRIEF

PAGE

Statement of Case 1

Points of Argument:

I. The grant of power given Congress by the commerce clause of the Constitution is comprehensive, includes every phase of interstate commerce, and the control to be exercised extends, not only to the movement of such commerce, but, in proper cases, to the commodities themselves as subjects thereof 2

II. The power given Congress respecting commerce between the states should be interpreted by reference to the nature, extent and purpose of the power as exercised by the states before it was committed to Congress; and modified only by the necessities of our dual form of government, and the other provisions of the Constitution into which the commerce clause has been integrated 6

III. Congress has the power to recognize a state policy aimed against competition of convict-made goods with the products of free labor, which tends to degrade or lower the social and economic standards of the state adopting such policy 8

IV. The power given Congress is in the nature of a political trust, and inseparable from it is the duty to recognize, in its exercise, the social and industrial conditions within the several states 11

V. The public policy involved is for legislative determination, and not dependent upon the police power 13

VI. There is no justiciable controversy 15

AUTHORITIES CITED

	PAGE
Adair v. U. S., 208 U. S. 161, 52 L. Ed. 436	4
Central Lumber Co. v. S. Dakota, 226 U. S. 157, 160, 57 L. Ed. 164	14
C. B. and Q. R. R. Co. v. McGuire, 219 U. S. 549, 569, 55 L. Ed. 328, 339	14
Clark Distilling Co. v. W. Md. R. R. Co., 242 U. S. 311, 61 L. Ed. 326	9
Crescent Oil Co. v. Miss., 257 U. S. 129, 66 L. Ed. 166	14
Dayton-Goose Creek R. R. Co. v. U. S., 263 U. S. 456, 68 L. Ed. 388	7
Hammer v. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101	11
Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. Ed. 1047	8
In re: Rahrer, 140 U. S. 545, 35 L. Ed. 572	9
Jacobson v. Mass., 197 U. S. 11, 30, 49 L. Ed. 643	13
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 55 L. Ed. 369	13
Mobile Co. v. Kimball, 102 U. S. 285, 26 L. Ed. 238, 241	3, 6
Mondou v. N. Y., N. H., and H. R. Co., 223 U. S. 1, 56 L. Ed. 327	7, 8
McCall v. California, 136 U. S. 104, 34 L. Ed. 391	4
Public Utilities Commission v. Landon, 249 U. S. 236, 63 L. Ed. 577	4
Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. Ed. 350	13
Rast v. Van Deman and L. Co., 240 U. S. 342, 357, 60 L. Ed. 679, 687	14
Robbins v. Taxing Dist. of Shelby Co., 120 U. S. 489, 30 L. Ed. 694	6
Rupert v. U. S., 181 Fed. 90, 104 C. C. A. 255	14
Simpson v. Shepard, 230 U. S. 352, 57 L. Ed. 1511	6
Swift & Co. v. U. S., 196 U. S. 375, 49 L. Ed. 518	4
West v. Kansas Natural Gas Co., 221 U. S. 229, 55 L. Ed. 716	9

STATUTES

	PAGE
Chapter 146, P. L. N. C. 1933	2
Federal Constitution, Art. I, Sec. 8.3	2, 11

IN THE

Supreme Court of the United States

October Term, 1932

No....., Original

STATE OF ALABAMA, *Plaintiff,*

vs.

THE STATES OF ARIZONA, CALIFORNIA, COLORADO, IDAHO, INDIANA, IOWA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, WASHINGTON, AND WISCONSIN, *Defendants.* } In Equity

BRIEF FOR THE STATE OF NORTH CAROLINA IN SUPPORT OF ITS RETURN TO RULE TO SHOW CAUSE WHY LEAVE TO FILE BILL OF COMPLAINT SHOULD NOT BE GRANTED TO PLAINTIFF, THE STATE OF ALABAMA.

STATEMENT

The State of Alabama, as a means of financial support of its prison system, undertook the manufacture of certain goods in its prison factories, installing at its Kilby Prison machinery and equipment to the capacity of 12,450 spindles, and at its

Speigner Prison machinery and equipment for 9,664 spindles. The State with its prison force, also cultivated several thousand acres of land in the production of farm products.

The defendant States have enacted laws excluding, or restrictively regulating, the sale of prison-made goods and products. Such action was taken by these several States based upon provisions of the Act of Congress of January 19, 1929, known as the Hawes-Cooper Act. The North Carolina statute is Chapter 146, Public Laws of North Carolina, Session of 1933, found at pages 63-65 of the motion and bill of complaint of the State of Alabama, and at pages 6 and 7 of the return of the State of North Carolina.

The State of Alabama filed its motion in the Supreme Court of the United States for leave to file bill of complaint against defendant States, asserting that the Hawes-Cooper Act, and the various statutes of the defendant States enacted in pursuance thereto, were unconstitutional and violative of the interstate clause of the Federal Constitution, Article I, Section 8.3. The State of North Carolina filed its return in answer to the rule to show cause, and now submits this brief in support of its contentions.

THE ARGUMENT

I.

THE GRANT OF POWER GIVEN CONGRESS BY THE COMMERCE CLAUSE OF THE CONSTITUTION IS COMPREHENSIVE, INCLUDES EVERY PHASE OF INTERSTATE COMMERCE, AND THE CONTROL TO BE EXERCISED EXTENDS NOT ONLY TO THE MOVEMENT OF SUCH COMMERCE, BUT, IN PROPER CASES, TO THE COMMODITIES THEMSELVES AS SUBJECTS THEREOF.

The simple statement of the power given to Congress is: "Sec. 8. The Congress shall have power . . . 3. To regulate commerce with foreign nations, and with the several

States, and with the Indian tribes." This simple statement, however, has been construed by the courts to take the subject entirely away from the States and commit it exclusively to the Congress.

While the word "regulate," *per se*, may not seem to be, from a dictionary point of view, a satisfying term to apply to the broad powers exercised by Congress, and assured to it by the courts, with regard to interstate commerce, on an analysis of the whole situation we are bound to ascribe to it the legal consequences which, step by step, the decisions of the Court have given it.

Under the power granted, it has been held that the Congress may legislate with respect to foods moving in interstate commerce, and even moral relations. It can even reach within the State and regulate intrastate rates, where they affect or work a discrimination with respect to interstate commerce.

Any power exercised by a State, and any law made by a State placing any sort of burden, by taxation or otherwise, upon interstate commerce, that is to say, any direct burden, must be, in the last analysis, regulatory in character, because its effect is to restrict that commerce, or to make it pursue a course different from that it would naturally take, either excluding it from the State or diminishing it in quantity, or compelling it to be done in a certain way. All these effects may be called regulatory.

The view of the matter adopted by the United States Supreme Court is expressed in *Mobile Co. v. Kimball*, 102 U. S. 285, 26 L. Ed. 238, 241, in an opinion by *Justice Field*, as follows:

> "Whether the power in any given case is vested exclusively in the general government depends upon the nature of the subject to be regulated." * * *
>
> "Perhaps some of the divergence of views upon this question among former judges may have arisen from not always bearing in mind the distinction between com-

merce as strictly defined, and its local aids or instruments, or measures taken for its improvement. Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, *as well* as the purchase, sale and exchange of commodities. For the regulation of commerce as thus defined, there can be only one system of rules applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible."

What is interstate commerce? What subjects may be so regulated?

Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. *Swift & Co. v. United States*, 196 U. S. 375, 49 L. Ed. 518.

Interstate commerce is a practical conception, and what falls within it must be determined upon consideration of established facts and known commercial methods. *Public Utilities Commission v. Landon*, 249 U. S. 236, 63 L. Ed. 577.

Commerce among the several States comprehends traffic, intercourse, trade, navigation, communication, and transit of persons, and the transmission of messages by telegraph, and other species of commercial intercourse.

Adair v. U. S., 208 U. S. 161, 52 L. Ed. 436.

Perhaps a better picture may be gotten from *McCall v. California*, 136 U. S. 104, 34 L. Ed. 391:

> " 'Commerce,' as used in United States Constitution, Article I, Section 8, clause 3, includes the fact of intercourse and of traffic and the subject-matter of intercourse and traffic. The fact of intercourse and traffic embraces all the means, instruments, and places by and in which

intercourse and traffic are carried on, and comprehends the act of carrying them on at these places by and with these means. The subject-matter of intercourse or traffic may be either things, goods, chattels, merchandise, or persons."

The power confided to Congress with relation to interstate commerce, therefore, includes not only the transaction itself, but the subject-matter of the intercourse or traffic which is interstate. Commerce does not, by any manner of means, mean transportation alone. The physical fact that a commodity is actually moving from one State into another is, of course, a conspicuous and relevant circumstance connected with interstate commerce, and part of it; but the transaction which lies behind it is equally "commerce," and often is of far more significance. It is, perhaps, almost too obvious to say that the power of the Congress, therefore, with respect to this regulation, is not confined to such transportation, a subject of regulation which is so much in evidence. It seems to be true that in its regulation, where reasonable distinctions might be made, the subject of the regulations might be the commodity itself, moving in interstate commerce; and where no injustice can occur by reason of this distinction to those who have the right to invoke the protection of any act of Congress relating to interstate commerce, no constitutional right has been invaded.

II.

THE POWER GIVEN CONGRESS RESPECTING COMMERCE BETWEEN THE STATES SHOULD BE INTERPRETED BY REFERENCE TO THE NATURE, EXTENT, AND PURPOSE OF THE POWER AS EXERCISED BY THE STATES BEFORE IT WAS COMMITTED TO CONGRESS; AND MODIFIED ONLY BY THE NECESSITIES OF OUR DUAL FORM OF GOVERNMENT, AND THE OTHER PROVISIONS OF THE CONSTITUTION INTO WHICH THE COMMERCE CLAUSE HAS BEEN INTEGRATED.

Perhaps there is not a clear line of distinction drawn in *Mobile Co. v. Kimball, supra,* between "commerce as strictly defined, and its local aids, or instruments, or measures taken for its improvement." It is, however, safe to say that the whole subject is committed to the control of Congress.

> *Robbins v. Taxing District of Shelby Co.,* 120 U. S. 489, 30 L. Ed. 694;
> *Simpson v. Shepard,* 230 U. S. 352, 57 L. Ed. 1511.

The power of Congress with respect to regulating interstate commerce may be best measured, therefore, by the powers of individual States which were surrendered to Congress, as it is not reasonable to suppose that certain of the powers exercised by the States theretofore, and which were not only proper but important and necessary, were lost out or evaporated in the transfer. The power of Congress to regulate commerce between the States is not merely to be construed as a source of inhibitions, that is to say, of powers to be exercised only to prevent interference by the States with commerce; they are available for more positive action, and wide enough to give the Congress authority to make such beneficent regulations of commerce between the States as will preserve, as nearly as may be, absolute equality amongst all of them,

secure harmony among the States with regard to such commerce, promote the general welfare, and aid, as far as possible, the operation of State laws reflecting a reasonable policy on the subject, and affording adequate protection to the inhabitants of such States in their industrial, social, and economic life and policy.

Mondou v. New York, New Haven & H. R. Co., 223 U. S. 1, 56 L. Ed. 327;
Dayton-Goose Creek R. Co. v. U. S., 263 U. S. 456, 68 L. Ed. 388.

Prior to the adoption of the Federal Constitution, each State had the equivalent right to legislate with regard to commerce between it and another State as it might have with regard to any foreign state. In doing so, it might levy an impost duty or excise tax to equalize competition of foreign goods manufactured under labor conditions which rendered their importation a menace to State welfare. In short, the State had all the power with reference to other States and foreign countries which Congress now has with regard to foreign nations.

A large part of this power cannot now be exercised by Congress with reference to the States, because in a system which is said to be "a State within a State," equality of treatment of the several States and their inhabitants, by Congress, must be preserved. However, when any one of the several States has adopted a policy affecting commerce which is entirely in accord with the view entertained by Congress itself as a policy to be observed in the regulation of foreign commerce, no State can complain, if and when, Congress has made it a principle of regulation of the commerce between the States as applied to all of them.

Originally, then, a State might exclude from importation and sale within its borders any object of commerce which it saw fit to exclude. The Congress then taking over this sub-

invigorated in deference to any police power in the State in its statutes; but, on the contrary, it was the unrestricted power of Congress, under the commerce clause, to deal with the whole subject in all of its relations, and therefore might have extended to other commodities which are not, either in their essential nature or in the manner of their handling, proper subjects of regulation under the police power.

3. The legislation was not considered by the courts as constituting a delegation to the State of the power granted Congress under the commerce clause of the Constitution, and which, concededly, Congress could not redelegate.

In the Wilson Act, and in the Webb-Kenyon Act, Congress undertook to deal with special instances of interstate commerce, the action taken being based on the character or nature of the commodity. But the commodity itself was not outlawed by government. The action taken, then, was an attempt to adapt the power Congress has, under the commerce clause, to the welfare of the people; and what is more significant, to the notion of welfare which the people of a particular State entertain; or, to explain it in other words, to the policy of the State government toward the particular commodity.

The action taken, then, establishes that the trend of the decisions is to the effect that the power given to Congress is not confined to the mere regulation of transportation of commodities from one State into another, but that its exercise may apply to the commodity itself. It is a power restricted only by such other clauses of the Constitution as may be pertinent to the subject, and which concern the right to engage in business under the equal protection of the law.

The Child Labor Act can easily be distinguished from the Hawes-Cooper Act, and the opinion in that case, properly explained, is no authority against the validity of the Hawes-Cooper Act. Logic and fairness, and the application of sound principles of construction, demand that this difference, which is just as substantial as it is technical, be faced with frank-

ness. The opinion in that case states the purpose and objective of the Child Labor Act in these words: "The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States"; and it concludes properly that such a purpose has nothing to do with Article I, Section 8.3, of the Constitution, and that the commerce clau e cannot be used as a camouflage or threat to enforce the adoption of intrastate laws fixing a minimum age for child labor.

Further, it is stated in the opinion in that case: "There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition."

The picture presented would doubtless be quite different had the act of Congress in question been predicated upon a recognition of State laws already adopted.

Hammer v. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101.

IV.

THE POWER GIVEN CONGRESS IS IN THE NATURE OF A POLITICAL TRUST, AND INSEPARABLE FROM IT IS THE DUTY TO RECOGNIZE, IN ITS EXERCISE, THE SOCIAL AND INDUSTRIAL CONDITIONS WITHIN THE SEVERAL STATES.

A complete transcription of human rights is not possible in any document. Beyond the range of constitutional provision there is a great catalogue of subjects which the people have thought it safe to leave to the humanness and natural reason of mankind in their law-making bodies. Under the Federal Constitution there is such a field. With respect to the commerce clause, it may be presumed that within it Congress will not be capricious, arbitrary, or oppressive, and that acting within the wide range of power conferred, its action can only

be stayed by other provisions of the Constitution of equal or superior dignity. There develops, then, a political, not a juridical, matter; and no person can complain in the courts at the plenitude of the power given, and the exercise of it by Congress "as nominated in the bond."

Obviously, if Congress has the power to legislate with regard to a particular commodity and exclude it from interstate traffic, an act of Congress, subjecting the article to a State law, which might have that effect, is also within its power. There are domains of action set apart for exclusive national or State activity. If the power to regulate commerce between the States had not been given to the Federal Government, subjects such as form the basis for this controversy might have been acted upon by the State without question. If the power given Congress means no more than the power to immunize commodities transported from one State into another from State action, there is a field, also, in which Congress may not act, and it is the same field—there is no sovereignty existing anywhere having power over the subject, and all commodities must be permitted to move, regardless of State or national policies. Surely, it is not meant that there shall here forever be a "no-man's land." If nature abhors a vacuum, no less does law resent the existence of a situation which, being beyond the pale of authority, outlaws law itself. The jurisdiction of courts may be questioned, but the total want of authority on the part of government in such a necessary matter will not be tolerated.

It is true that the State and Federal Governments cannot conjointly exercise the same governmental function, as their legislative powers are independent of each other; but numerous instances exist of each acting independently through its own law-making body, and dealing with the same subject by mutual accord. The relationship between the two forces operating in different spheres of the same field may be and is here so adjusted as to produce harmony and concert of action rather than turmoil and conflict.

The objects sought to be attained by the Hawes-Cooper Act, and legislation of the defendant States thereunder, is reasonable and consonant with the express policy of the United States Government, and relates to subjects proper for Congressional regulation. From the necessities of the case, it can only be dealt with by correlated State and Federal action. The construction of the Constitution sought by the complainant would produce a hiatus between State and Federal authority—on a subject essential to the welfare and orderly government of the people. The presumption is against such want of authority producing such a result.

V.

THE PUBLIC POLICY INVOLVED IS FOR LEGISLATIVE DETERMINATION, AND NOT DEPENDENT UPON THE POLICE POWER.

In *Quong Wing v. Kirkendall*, 223 U. S. 59 (at p. 62), 56 L. Ed. 350, the Court said:

> "A State does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such way as to favor certain industries or forms of industry. Like the United States, although with more restriction and in less degree, a State may carry out a policy, even a policy with which we might disagree."

A State may enact proper legislation to prevent the waste and destruction of its natural resources.

> *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 55 L. Ed. 369.

> "We must assume that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories and was compelled, of necessity, to choose between them."

> *Jacobson v. Mass.*, 197 U. S. 11, 30, 49 L. Ed. 643.

"The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound or economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

C. B. & Q. R. R. Co. v. McGuire, 219 U. S. 549, 569, 55 L. Ed. 328, 339.

"It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury, but obstacles to a greater public welfare."

Rast v. Van Deman & L. Co., 240 U. S. 342, 357, 60 L. Ed. 679, 687.

"If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."

Central Lumber Co. v. S. Dakota, 226 U. S. 157, 160, 57 L. Ed. 164.

See: *Rupert v. U. S.*, 181 Fed. 90, 104 C. C. A. 255.

A State may adjust its laws so as to prevent a practice conceived to be promotive of monopoly with its attendant evils.

Crescent Oil Co. v. Miss., 257 U. S. 129, 66 L. Ed. 166.

The Congress has the power to aid the States in an attempt through their own laws, and in their own territory, to foster and promote the social and economic well-being of the citizenship. It may exercise any of the powers conferred to that end. The States may do the same. In this hour, when the people have an awakened consciousness regarding the part the Government is intended to play in all the affairs of human life, and when the Federal Constitution is being anxiously examined for an interpretation which may make it cover the imperative necessities of this day, and the coming tomorrow, the commerce clause should be invigorated to aid in that correlated action of Nation and State which will be consonant with the aims and purposes of humanity itself.

But, aside from any other consideration within the narrowest compass of legalistic thought, a regulation of interstate commerce which, at a given point, submits the commodity in question to the laws of the State in which it is intended to move is not in any sense a delegation by Congress of its constitutional powers to a State; the effect only is to put the commodity into a category where it becomes amenable to a State law.

VI.

THERE IS NO JUSTICIABLE CONTROVERSY.

The proposed bill of complaint states no actionable wrong, either committed or in contemplation, on the part of North Carolina. The State of Alabama is engaged in a commercial enterprise. Under such circumstances it is subject to the same rules of law as any non-governmental agency. Moreover, it does not aver that Alabama has tried to sell its convict-made goods in this State and has been prevented from so doing.

We respectfully submit that the proposed bill of complaint sets forth no sufficient grounds for bringing the defendant

States before this Court upon the causes as alleged and set forth therein.

This December 28, 1933.

DENNIS G. BRUMMITT,
Attorney General of North Carolina;

A. A. F. SEAWELL,
Assistant Attorney General of North Carolina.

ILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. . . . . , Original
In Equity

STATE OF ALABAMA,
Plaintiff

v.

STATE OF ARIZONA, et al.,
Defendants

BRIEF FOR DEFENDANTS SUR RULE TO SHOW CAUSE WHY LEAVE SHOULD NOT BE GRANTED TO FILE BILL OF COMPLAINT

WM. A. SCHNADER,
Attorney General
of Pennsylvania.

Appearing as Representative of
Counsel for Defendant States
listed within.

STATE CAPITOL,
HARRISBURG, PA.

COUNSEL FOR DEFENDANT STATES WHICH FILED RETURNS AND BRIEFS.

Arizona:

ARTHUR T. LAPRADE,
Attorney General.

California:

U. S. WEBB,
Attorney General.
W. R. AUGUSTINE,
Deputy Attorney General.

Colorado:

PAUL P. PROSSER,
Attorney General.
NORRIS C. BLAKE,
Deputy Attorney General.
ALLEN MOORE,
Assistant Attorney General.

Idaho:

BERT H. MILLER,
Attorney General.

Indiana:

PHILIP LUTZ, JR.,
Attorney General.
JOSEPH W. HUTCHINSON,
Assistant Attorney General.

INDEX

		Page
Statement		1
Argument		4
I.	Summary	4
II.	There is a Misjoinder of Parties Defendant and of Causes of Action	6
III.	There is No Controversy Between Alabama and the Defendant States	11
	Cases Cited by Plaintiff on this Point	13
IV.	The States Are Not Proper Parties Defendant	16
V.	Plaintiff is Guilty of Laches	19
VI.	The Bill Does Not Allege Violation of Any Right Guaranteed to Alabama By the Constitution of the United States	19
	(a) The Fourteenth Amendment Affords no Basis for the Action	19
	(b) The Hawes-Cooper Act Does Not Violate either the Interstate Commerce Clause of or the Tenth Amendment to the Constitution	20
	(c) The State Acts Do Not Violate the Interstate Commerce Clause	22
	(d) State Acts Impose No Greater Restriction on Foreign Goods than on Goods Produced in Institutions of the States	23
VII.	The Bill is an Attempt to Interfere With Internal Affairs of the States	24
VIII.	There is No Direct Injury or Threat of Such Injury to Property Rights of Alabama	25
IX.	A State As Parens Patriae May Not Attack a Federal Statute	28
X.	The Questions Here Raised May Properly Be Disposed of in Another Case	29
XI.	Conclusion	30

TABLE OF CASES CITED

	Page
Albright v. Board of Commissioners of Douglas County, 194 Pac. 913 (Kan.)	20
American Manufacturing Co. v. St. Louis, 250 U. S. 459	26
Benjamin v. Stanley Co. of America, 37 F. (2d) 904	9
Bitterman v. Louisville & Nashville R. R. Co., 207 U. S. 205	10
Brown v. Guarantee Trust & Safe Deposit Co., 128 U. S. 403	9-11
Clark Distilling Co. v. Western Maryland Ry., Co., 242 U. S. 311	21
Coe v. Errol, 116 U. S. 517	27
Connecticut v. Massachusetts, 282 U. S. 660	11-25
Cooke v. United States, 91 U. S. (1 Otto) 389	19
Cornell v. Coyne, 192 U. S. 418	26
Delaware L. & W. R. R. Co. v. Yurkonis, 238 U. S. 439	27
Florida v. Miller, 273 U. S. 12	13
Georgia v. Stanton, 73 U. S. (6 Wall.) 50	12-28
Gorham Mfg. Co. v. Wendell, 261 U. S. 1	17
Greenthal v. Bennett, Supreme Court of New York (1833)	29
Gregg Dyeing Co. v. Query, 286 U. S. 472	23
Hale v. Allison, 188 U. S. 56	9
Hammer v. Dagenhart, 247 U. S. 251	26
Heisler v. Thomas Colliery Coal Co., 260 U. S. 245	26
Hope Natural Gas Co. v. Hall, 274 U. S. 282	27
Jacob Hoffman Brewing Co. v. McElligott, 259 Fed. 525	24
Kansas v. Colorado, 185 U. S. 125	11
Kidd v. Pearson, 128 U. S. 1	26
La Prade, Ex Parte, U. S. 77, L. ed 860	17-25
Louisiana v. Texas, 176 U. S. 1	12-28
Massachusetts v. Mellon, 262 U. S. 447	15-29

	Page
Missouri v. Illinois, 180 U. S. 208	13-14-28
New Hampshire v. Louisiana, 108 U. S. 76	28
Ohio v. West Virginia, 252 U. S. 563	11
Pennsylvania v. West Virginia, 252 U. S. 563	11
Pennsylvania v. West Virginia, 262 U. S. 553	15
Pennsylvania v. Wheeling & Belmont Bridge Co., 9 How. 647	14-28
Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531	20
Rahrer, In Re, 140 U. S. 545	5-21
Rhode Island v. Massachusetts, 14 Pet. 210	11
Rhodes v. Iowa, 170 U. S. 412	21
Sawyer, Ex Parte, 124 U. S. 200	24
Scott v. Frazier, 259 Fed. 669, 253 U. S. 243	20
South Carolina v. United States, 199 U. S. 437	19
United Mine Workers of America v. Coronado, 259 U. S. 324	26
United States v. E. C. Knight Co., 156 U. S. 1	26
Vilas v. Manila, 220 U. S. 345	19
Wisconsin v. Pelican Insurance Co., 127 U. S. 265	12
Young, Ex Parte, 209 U. S. 123	16-24

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States, Amendment X	20-21
Constitution of the United States, Amendment XIV	4-19-24

ACTS OF CONGRESS

Act of January 19, 1929, 45 Stat. 1084, c. 79, 49 U. S. C. A. 65 (Hawes-Cooper Act)	2-5-7-20-21-22-29
Act of August 8, 1890, 26 Stat. 313, c. 728, (Wilson Act)	5-21

PENNSYLVANIA ACT

Act of May 3, 1850, P. L. 654, Sec. 1, 16 PS Sec. 3431	18
CONSTITUTION OF PENNSYLVANIA, Art. XIV., Sec. 1	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. —, Original
In Equity

STATE OF ALABAMA,
Plaintiff

v.

STATE OF ARIZONA, et al.,
Defendants

BRIEF FOR DEFENDANTS SUR RULE TO SHOW CAUSE WHY LEAVE SHOULD NOT BE GRANTED TO FILE BILL OF COMPLAINT

STATEMENT

This is a suit in equity in which the State of Alabama seeks to invoke the original jurisdiction of this court to enjoin the defendant states from enforcing the various provisions of their respective laws which restrict or regulate the sale within the states of convict made goods. Those acts vary considerably in their operation but they fall into two general classes. One class requires that convict made goods, when exposed

for sale, be labeled or branded in specific ways. The statutes of the other class directly restrict the sale of such goods.

The bill attacks the constitutionality of the State statutes and of the Hawes-Cooper Act of Congress of January 19, 1929, 45 Stat. 1084 c. 79 (49 U. S. C. A. 65). That act provided that convict made goods entering a state should be subject to the laws of the State, even though remaining in the original packages. A number of the State statutes attacked were adopted as a result of that Act of Congress.

The case is now before the court on a rule to show cause why Alabama should not be allowed to file the bill of complaint which it has submitted.

The bill named nineteen states as joint defendants. We are informed that the plaintiff has agreed that the proceeding be dismissed as to Oklahoma and Michigan. The remaining states have filed separate returns to the rule. All but Kentucky have set up reasons why Alabama should not be permitted to file its bill, and supporting authorities were cited in the returns or in accompanying briefs.

In order to avoid the duplication of effort and the unnecessary consumption of time of the court which would inevitably result if each of the sixteen contesting defendants sought to present its case independently, it has been informally agreed (except by Wisconsin) that the attorneys general of Montana and Pennsylvania should present the principal briefs and

arguments for the states which have gone on record as opposed to the filing of the bill.

This brief, prepared by the Attorney General of Pennsylvania, summarizes the principal points made by the several defendants in their separate returns and supporting briefs, without pretending to be a complete reproduction of the arguments or a substitute for those briefs in all respects.

The constitutionality of the Hawes-Cooper Act is not discussed at length, because that is the subject of the brief filed by the attorney general of Montana.

Certain grounds of opposition peculiar to individual States are set out in the various returns, but are included here by reference only.

ARGUMENT

I

Summary

The bill improperly joins nineteen separate causes of action against nineteen different states. There was no joint action of the states in enacting the statutes under attack and there could be no joint enforcement of them.

There is no justiciable controversy between Alabama and the defendants, as that term has been defined by this Court. There are no agreements between the states which have been violated, and no effort has been made to adjust the alleged disputes between the states.

The states are not proper defendants. Proceedings to enjoin enforcement of statutes alleged to be unconstitutional should be directed against the officers who would enforce them, not against the states. In Pennsylvania, at least, criminal statutes are enforced by district attorneys who are not state, but county officers.

The plaintiff is guilty of laches.

Alabama is not within the protection of the Due Process or Equal Protection clauses of the Fourteenth Amendment. Therefore, it is not in a position to raise in this proceeding any question as to the exercise of another state's police power and its effect on the revenues of Alabama, except under the Interstate Com-

merce Clause. But apart from that, in most instances the states impose no greater burden on the sale of convict made goods coming from Alabama than they do on the sale of products of their own institutions.

The Act of Congress under attack, the Hawes-Cooper Act, does not violate the Interstate Commerce Clause of the Constitution nor the Tenth Amendment. It is a complete parallel to the Wilson Act which was sustained in IN RE RAHRER, 140 U. S. 545 (1891) and later cases. The State statutes are valid because the Hawes-Cooper Act is valid.

The bill is an unwarranted attempt by Alabama to interfere with the internal affairs of the defendants and to prevent enforcement of their criminal laws.

There is no threat of enforcement alleged. And even if there were such a threat, the bill discloses that the injuries which Alabama anticipates, are not such direct property injuries as would induce a court of equity to interfere, but are indirect, remote and speculative. It does not allege substantial injury to any sovereign or proprietary interest of Alabama which may be redressed in this court. It is not brought in behalf of citizens generally, but for the benefit of a single private corporation. But even if regarded as a bill filed by Alabama as *parens patriae,* it is not maintainable, because a state may not, in that capacity, attack the validity of an Act of Congress.

The validity of the Hawes-Cooper Act and of a State statute which was enacted under it, may be decided in a properly brought case now pending in New York.

II

There is a Misjoinder of Parties Defendant and of Causes of Action

This bill of complaint joins as defendants nineteen states. (Two of these have been eliminated, however). It seeks to enjoin each one of the defendants from enforcing its particular statute dealing with the sale of convict made goods.

Each one of these statutes is an act adopted by a single state independently of any action by the others. Each act is effective only within the territory of the state which adopted it, and can be enforced only by the proper authorities within that state against persons within the jurisdiction of the courts of the state. It is obvious that there was no joint action of the various defendants in enacting these laws, and there could not possibly be any joint action in their enforcement. It follows that there could not properly be a single decree against all the defendants; seventeen separate injunctions would be necessary, each against a single defendant.

Moreover, it is apparent on the face of the bill that there is no uniformity among the state acts attacked.

The acts of twelve of the defendant states, as set forth in the bill, (California, Colorado, Indiana, Iowa, Kentucky, Minnesota, Montana, New Jersey, Ohio, Oregon, Washington and Wisconsin) only **regulate** the sale of convict made goods.

However, the returns of California, Colorado and Montana aver that their labeling acts have been or will be superseded when the Hawes-Cooper Act becomes effective, by restrictive laws, of the type next discussed.

These regulations all include requirements that such goods be labeled or branded in prescribed ways.

The Kentucky Act (Bill p. 52), also requires the conspicuous labeling of vehicles conveying convict made goods.

California, Oregon and Washington also require the disinfection or sterilization of such goods. Under the California Act the sterilization must be done within the State of California, and by the express provisions of the same act, neither labeling nor sterilization is required of convict made goods produced in California (Bill p. 34).

On the other hand, the bill shows that six of the defendant states (Arizona, Idaho, Indiana, New York, North Carolina and Pennsylvania) directly restrict sales of convict made goods in ways which vary considerably in detail. The returns of California, Colorado and Montana aver that they also now have, or soon will have in effect restrictive statutes of the same kind.

The general restriction is against the sale of convict made goods on the open market. However, the New York Act, as amended (see Return of the State of New

York to this rule, pp. 2, 3) forbids all sales of such goods except as between public institutions and political subdivisions of the State. The new Montana Act, set out in its return, is similar in effect.

Arizona also forbids state and municipal officers to expend public moneys for such goods under any circumstances.

The new Colorado Act (Return, p. 3) forbids not only the sale, but also the use and consumption of convict made goods.

Idaho gives a far reaching effect to its act by defining the term sales on the open market to mean "all sales and/or exchanges * * * to the consuming public" (Bill, p. 41). The definition in the new Montana Act is, if possible, even broader. (See Return of Montana, p. 6).

Indiana, which it will be noted also requires labeling, forbids sale of convict made goods except by licensed dealers, who are required to pay an annual license fee of $500.00 (Bill, p. 44). This provision injects questions as to the validity of revenue laws into the case, so far as Indiana is concerned.

North Carolina exempts certain products from the general restrictions of its statute (Bill, p. 63).

The returns of certain of the defendant states set up a defense of laches. The differences in the ages of the various laws which are here attacked would make

it impossible to consider such a defense as applying to all or any particular group of the defendants. The Kentucky Act dates from 1894 (Bill, p. 50), the Indiana Act from 1914 (Bill, p. 42), the Colorado and Montana Acts from 1921 (Bill, pp. 35, 59), the New Jersey Act from 1925 (Bill, p. 60), and the Washington Act from 1927 (Bill, p. 73). Other acts are younger, and some of them will not be effective until January 1934.

The returns of the various defendants also disclose other individual grounds of defense which could not be considered jointly with the defenses of other states. An example is the defense of the Commonwealth of Pennsylvania which appears on page 4 of its return, which alleges that the Pennsylvania act under attack would not be enforced by state officers and therefore, the present proceeding against the State would be ineffectual.

Therefore, we respectfully submit that there is no proper ground for uniting the complaints of the State of Alabama against the nineteen defendants under Equity Rule No. 26: BROWN v. GUARANTEE TRUST AND SAFE DEPOSIT CO., 128 U. S. 403, 410, 411, 412 (1888); BENJAMIN v. STANLEY CO. OF AMERICA, 37 F. (2d) 904, 905 (1930).

The plaintiff quotes from several decisions of this court to support its joinder of the defendants here. None of them supports its position.

HALE v. ALLINSON, 188 U. S. 56 (1903), involved the

The bill of complaint does not allege either that any agreement between the State of Alabama and any of the defendant States has been violated or that any effort to adjust the differences between Alabama and the defendant states has been made. Therefore the bill discloses no justiciable controversy between states.

In LOUISIANA v. TEXAS, 176 U. S. 1 (1900), this Court said (pages 18 and 22):

> "In the absence of agreement it may be that a controversy might arise between two states for the determination of which the original jurisdiction of this court could be invoked, but there must be a direct issue between them, and the subject-matter must be susceptible of judicial solution. And it is difficult to conceive of a direct issue between two states in respect of a matter where no effort at accommodation has been made; nor can it be conceded that it is within the judicial function to inquire into the motives of a state legislature in passing a law, or of the chief magistrate of a state in enforcing it in the exercise of his discretion and judgment. Public policy forbids the imputation to authorized official action of any other than legitimate motives.
>
> "* * * When there is no agreement whose breach might create it, a controversy between states does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one state to a distinct collision with a sister state."

See also WISCONSIN v. PELICAN INSURANCE COMPANY OF NEW ORLEANS, 127 U. S. 265, 288 (1888); GEORGIA v. STANTON, 73 U. S. (6 Wall.) 50 (1868).

In FLORIDA v. MILLER, 273 U. S. 12 (1927), this court refused to entertain an original action by the State of Florida. Mr. Justice Sutherland said (pp. 16-17):

> "While judicial relief sometimes may be granted to a quasi sovereign state under circumstances which would not justify relief if the suit were between private parties (Georgia v. Tennessee Copper Co. 206 U. S. 230, 237, 51 L. ed. 1038, 1044, 27 Sup. Ct. Rep. 618, 11 Ann. Cas. 488), nevertheless, it must appear that the state has suffered a wrong furnishing ground for judicial redress or is asserting a right susceptible of judicial enforcement. The mere fact that a state is the plaintiff is not enough. Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 287, 32 L. ed. 239, 242, 8 Sup. Ct. Rep. 1370; Oklahoma v. Atchison, T. & S. F. R. Co. 220 U. S. 277, 286, 289, 55 L. ed. 465, 468, 469, 31 Sup. Ct. Rep. 434."

Neither of the conditions specified in the foregoing quotation is present here.

Cases Cited by Plaintiff on this Point.

Beginning at the bottom of page 9 and extending to page 26 of the plaintiff's brief we find a collection of judicial and historical authorities which are apparently intended to prove that the present case presents a justiciable controversy between states.

MISSOURI v. ILLINOIS, 180 U. S. 208 (1901), held that a bill which alleged that Illinois was about to pour large amounts of sewage into waters flowing through Missouri, to the danger of the health and lives of resi-

dents of Missouri, presented a controversy between states within the meaning of the Constitution.

No such state of facts exists in the present case. There the defendant was, in effect, invading the plaintiff state by creating a dangerous nuisance. Here the plaintiff seeks to invade the defendant states to work its will on them.

Following the example of Mr. Justice Shiras in MISSOURI v. ILLINOIS, supra, plaintiff has looked into the Articles of Confederation and has examined the proceedings of the constitutional convention concerning settlement of disputes between states (Plaintiff's brief p. 13 et seq.). As a result of this research, plaintiff concludes that (Brief, p. 19):

> "* * * it is apparent that from the Declaration of Independence controversies between two or more states were expected and provision was made for their determination."

The profound wisdom of this conclusion is attested by the language of Article III, Section 2 of the Constitution itself and by numerous cases in this court.

In PENNSYLVANIA v. WHEELING & BELMONT BRIDGE CO., 9 How. 647 (1850) this court, by appointing a master to take testimony, took jurisdiction of a bill filed by Pennsylvania to prevent a private corporation from obstructing navigation of the Ohio River. It was alleged that the obstruction prevented Pennsylvania boats from descending and ascending the river and injured the trade and commerce of Pennsylvania citizens.

If this case and others on page 23 of plaintiff's brief are cited here to show that a state may sue as *parens patriae,* or in a proprietary capacity, we concede the point. But, as we shall later and more fully point out, Alabama's bill is not in the interest of its citizens generally, but in the interest of a single private corporation; and even if it had standing as *parens patriae,* it could not in that capacity attack the validity of an Act of Congress: MASSACHUSETTS v. MELLON, 262 U. S. 447, 485 (1923).

Moreover, it is not on the ground that Alabama asserts only a proprietary interest that we say there is no justiciable controversy between states within the meaning of the constitution; it is our position that there is no such injury to any proprietary interest alleged as would create a controversy cognizable in this court.

Therefore the cases cited have no bearing on the present issue.

PENNSYLVANIA v. WEST VIRGINIA, 262 U. S. 553, 591 (1923) is cited. In that case, this court, at the suit of Pennsylvania and Ohio, enjoined West Virginia from requiring producers of natural gas in West Virginia to curtail materially or cut off supplies of natural gas which had been furnished to consumers in the plaintiff states. It was held that there was a justiciable controversy, but the issues on which that ruling was made were far different from any issues in the present case.

There, West Virginia for years had permitted gas to be piped to neighboring states. The states and private consumers were dependent on this supply for fuel. The plaintiffs were acting to prevent direct and immediate injury to their schools and institutions and to large numbers of their citizens. Mr. Justice Van Devanter said (p. 592):

> "* * * This is a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest, but one which is immediate and recognized by law."

The subject matter of the present suit is not of grave public concern, and Alabama's interest in it is remote, and, we submit, the remedy sought, is not recognized by law.

IV

The States Are Not Proper Parties Defendant

Examination of the cases in which injunctions have been sought against the enforcement of unconstitutional statutes reveals that almost without exception the proceedings have been instituted against the officers who would enforce the statutes. And that is the proper course to pursue. Such actions are entirely personal in their nature; they enjoin the individual not the incumbent of an office. As was pointed out in Ex Parte Young, 209 U. S. 123, 159 (1908), the act of an official in attempting to enforce an unconstitutional statute:

"* * * is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. * * *"

The above statement was repeated and approved in Ex Parte La Prade, — U. S. ——, 77 L. ed. 860, 863 (1933).

So personal is a proceeding against an officer to enjoin enforcement of an unconstitutional statute that, without statutory authority to the contrary, the action abates if the particular officer ceases to occupy the office while the suit is pending. It is not the office but the individual who is enjoined: Ex Parte La Prade, — U. S. —, 77 L. ed. 860, 863 (1933); Gorham Manufacturing Company *v.* Wendell, 261 U. S. 1 (1923). It is our position that a proceeding of this kind must be instituted against the individual officer who would enforce it, and not against the state itself.

If an injunction should be issued against a State under the prayers of the present bill, upon whom would it operate? Would it operate in personam against all state officers, in spite of the fact that only two of them, the Governor and the Attorney General were served with process? Would it restrain the courts of the State? And if effective against state officers, would it apply to their successors in office? If, under the cases just cited, a pending action directly against a state officer does not survive against his

successor, would an injunction so survive? We submit that it could not.

But an even more serious obstacle to the effectiveness of any restraining order under the present bill is that in some of the defendant states the statutes here under attack would not be enforced by the Attorney General, or by other state officers, but by county officers.

The statutes in question are criminal acts, to be enforced by prosecuting officers in the criminal courts of the states. In Pennsylvania, for example, the responsibility for and the conduct of all prosecutions devolves upon the district attorneys in the several counties of the State (Act of May 3, 1850, P. L. 654, Sec. 1, 16 PS Sec. 3431, a copy of which is printed at page 8 of the return filed by Pennsylvania in this case). And under Article XIV, Section 1 of the Constitution of Pennsylvania (See p. 7 of Pennsylvania's return) district attorneys are not State officers but county officers.

Consequently, even if the court should issue an injunction against a state having a system such as that of Pennsylvania, and if the injunction should be construed to be binding on the present state officers, it would not reach the officials who would have charge of direct enforcement of the act of which Alabama complains.

V

Plaintiff is Guilty of Laches

The return filed by Idaho (pp. 9-10) makes the point that the bill discloses on its face that Alabama, in connection with Gordon East Coast Co., is engaging in the production of prison made commodities as an ordinary business. This is a private or proprietary, not a governmental function of the State. Therefore, Alabama is subject to the defenses available against private litigants (SOUTH CAROLINA *v.* UNITED STATES, 199 U. S. 437, 463 [1905]; VILAS *v.* MANILA, 220 U. S. 345 [1911]), and particularly the defense of laches: COOKE *v.* UNITED STATES, 91 U. S. (1 Otto) 389 (1875).

As is pointed out at pages 10 and 11 of the return filed in this case by Idaho, the oldest State act here attacked goes back to 1894, and a number of others are over ten years old. This action comes tardily both as to those acts and as to similar restrictions arising out of new acts in those States.

VI

The Bill Does Not Allege Violation of Any Right Guaranteed to Alabama By the Constitution of the United States

(a) The Fourteenth Amendment Affords no Basis for the Action

The bill of complaint which Alabama seeks to file nowhere directly alleges that the statutes attacked

violate the Fourteenth Amendment to the Constitution of the United States. However, the allegations indicate that Alabama bases its claims in part at least on contentions that enforcement of the state statutes in question would deprive it of property without due process of law and of the equal protection of the laws.

The Fourteenth Amendment "protects persons only, a term which embraces private corporations, but not public corporations or states:" SCOTT *v.* FRAZIER, 259 Fed. 669, 671 (1919), decided on another point in 253 U. S. 243 (1920). To the same effect is ALBRIGHT *v.* BOARD OF COMMISSIONERS OF DOUGLAS COUNTY, 194 Pac. 913, 915 (Kan. 1921). And one who would strike down a state statute as violative of the Federal Constitution must show that the alleged unconstitutional feature deprives him of rights protected by the Federal Constitution: PLYMOUTH COAL CO. *v.* PENNSYLVANIA, 232 U. S. 531, 544, 545 (1914).

Therefore, this plaintiff cannot maintain a bill based on the complaint that it is being deprived of its property without due process of law or of the equal protection of the laws.

(b) The Hawes-Cooper Act Does Not Violate either the Interstate Commerce Clause of or the Tenth Amendment to the Constitution.

The Act of Congress of January 19, 1929, 45 Stat. 1084, c 79 (49 U. S. C. A. 65; Bill of Complaint p. 77), commonly known as the Hawes-Cooper Act, is attacked as violating the Interstate Commerce Clause

(Art. I, Sec. 8, Clause 3) of the Constitution of the United States.

The Hawes-Cooper Act is a complete parallel to the Act of Congress of August 8, 1890, 26 Stat. 313, c. 728, commonly known as the Wilson Act. The Wilson Act left the states free to deal with intoxicating liquors in precisely the same way that the Hawes-Cooper Act leaves the states free to deal with convict made goods.

In IN RE RAHRER, 140 U. S. 545 (1891), every possible objection was raised against the Wilson Act which could be raised against the Hawes-Cooper Act. These objections were considered at length in the opinion of this Court and they were all resolved in favor of the validity of the act. Later cases have followed the RAHRER CASE and have reiterated the constitutionality of the Wilson Act. RHODES v. IOWA, 170 U. S. 412, 417, 420 (1893); CLARK DISTILLING COMPANY v. WESTERN MARYLAND RAILWAY COMPANY, 242 U. S. 311, 323, 326, 330 (1917), and cases therein cited.

The Bill of Complaint (page 10) alleges that the Hawes-Cooper Act violates the Tenth Amendment to the Constitution of the United States. The opinion of this Court in the RAHRER CASE demonstrates, if demonstration be necessary, that the Hawes-Cooper Act, like the Wilson Act, does not violate the Tenth Amendment, but gives direct effect to it.

A complete discussion of the constitutionality of the Hawes-Cooper Act and a reply to the plaintiff's argument on this point is set forth in the brief filed

by the Attorney General of Montana. Therefore, we shall not elaborate on the subject here.

(c) The State Acts Do Not Violate the Interstate Commerce Clause.

The State acts which simply regulate the sale of convict made goods by requiring branding, labeling and disinfecting, or which require vendors to procure licenses, obviously have nothing to do with interstate commerce.

The acts which directly restrict the sale of convict made goods imported from other states no doubt bear more directly on interstate commerce. But whether or not any particular act here in question would be in violation of the interstate commerce clause in the absence of the Hawes-Cooper Act is important only if that statute is unconstitutional.

If the Hawes-Cooper Act is constitutional, all of these acts are clearly valid as far as the interstate commerce clause is concerned. In that situation, enforcement of the state statutes becomes a simple exercise of the police power of the states, freed from the restrictions of the Interstate Commerce Clause of the Federal Constitution.

If it be objected that sales of convict made goods may not be regulated under the police power of the state to the same extent as sales of intoxicating liquor, the answer is that that question cannot properly be brought before the court in this case. Limitations on

the police power of the state, with respect to private property, are imposed by the state constitutions and by the Fourteenth Amendment to the Federal Constitution. The State of Alabama has no rights under the constitutions of the several States nor, as we have demonstrated, under the Fourteenth Amendment. Consequently, the plaintiff cannot question the police power of the defendant states within their own borders, as long as the Interstate Commerce Clause is not violated.

(d) State Acts Impose No Greater Restriction on Foreign Goods than on Goods Produced in Institutions of the States

The returns of a number of the states plead facts which show that their statutes which are attacked in this case impose no greater burdens on the sale of convict made goods coming from foreign states than on the sale of goods produced within their own institutions. In some cases this equality of burden may not be apparent on the face of the acts printed in the plaintiff's bill, but it results from the existence of coordinate legislation in the states, and which has been pleaded in the separate returns. And in passing on the constitutionality of a State statute, this court will look at all the statutes of the State which bear on the subject, and will consider the total effect: GREGG DYEING CO. v. QUERY, 286 U. S. 472, 480 (1932). However, even if there were heavier restrictions on the sale of foreign goods than on domestic goods, that would be no basis for a complaint of violation of the Equal Protection Clause of the Fourteenth Amendment. As we

> magnitude and established by clear and convincing evidence. * * *"

There is no allegation in the bill that Alabama is either engaged in or is desirous of engaging in the shipment of any goods whatsoever into any of the defendant states or in the sale of goods in those states.

At most, Alabama is the manufacturer or producer of the goods. She produces the farm products mentioned in the bill, and has a part in the manufacture of the shirts. But manufacture is not commerce. In UNITED STATES v. E. C. KNIGHT Co., 156 U. S. 1 (1895), this court said (pp. 12, 13):

> "* * * Commerce succeeds to manufacture, and is not a part of it. * * *
>
> "* * * The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacture does not determine the time when the article or product passes from the control of the state and belongs to commerce. * * *"

To the same effect are KIDD v. PEARSON, 128 U. S. 1, 24 (1888), CORNELL v. COYNE, 192 U. S. 418, 428 (1904), and AMERICAN MANUFACTURING COMPANY v. ST. LOUIS, 250 U. S. 459 (1919).

The mining of coal to be sold in other states is not interstate commerce: HEISLER v. THOMAS COLLIERY COAL COMPANY, 260 U. S. 245 (1922); HAMMER v. DAGENHART, 247 U. S. 251, 272 (1918); UNITED MINE WORKERS OF AMERICA v. CORONADO COAL COMPANY, 259

U. S. 324, 407 (1922) and DELAWARE L. & W. R. R. COMPANY v. YURKONIS, 238 U. S. 439 (1915). Nor is the production of natural gas for similar purposes: HOPE NATURAL GAS COMPANY v. HALL, 274 U. S. 282 (1927).

Likewise, farm products are not in interstate commerce until they have "entered upon their final journey for leaving the state and going into another state." Even when collected at a central depot prior to shipment, they are not in interstate commerce: COE v. ERROL, 116 U. S. 517, 525, 528 (1886).

As a matter of fact, it is doubtful whether it can properly be said that Alabama manufactures these shirts. The allegations of the bill make it clear that they are produced under a contract labor system. The State does not even fully operate the factories which produce the convict made shirts. The contractor furnishes the necessary equipment for manufacturing the shirts (Bill, Paragraph 8, p. 13). The State does not sell the shirts in the first instance; it simply sells the labor of its prisoners (Bill, paragraphs 8 and 9, pp. 14, 15), and some of the materials (Bill, paragraph 10, p. 15), and the contractor makes and sells the shirts.

Thus the plaintiff seeks to enjoin restrictions on the sale of shirts in foreign states by a private corporation which purchases labor and materials from the State of Alabama for the manufacture of the shirts. In fact, paragraph 14 of the Bill (p. 18) indicates that the contracting corporation itself does not make sales

in the foreign states, at least not to consumers, but that such sales are made by wholesale and retail merchants in the other states.

We submit that, apart from all other reasons, the interest of the State of Alabama in the sales of these goods in foreign states is not such a property right as can be made the subject of injunctive relief in this court: GEORGIA v. STANTON, 73 U. S. (6 Wall.) 50 (1867). It is too remote, too speculative.

If any property rights are directly involved, they are the rights of the private corporation to which Alabama sells labor and materials. But in that case, this bill constitutes an attempt of the state to vindicate grievances of particular individuals. This court has said that its jurisdiction may not be invoked for that purpose: LOUISIANA v. TEXAS, 176 U. S. 1, 16 (1900); NEW HAMPSHIRE v. LOUISIANA, 108 U. S. 76 (1883).

IX

A State As *Parens Patriae* May Not Attack a Federal Statute

The plaintiff seems to take the position that it may maintain this bill in behalf of its citizens as *parens patriae*. Presumably in support of this position, it has cited PENNSYLVANIA v. WHEELING & BELMONT BRIDGE CO., 9 How. 647 (1850), MISSOURI v. ILLINOIS, 180 U. S. 208 (1901). Even if we should concede,—which we do not,—that the bill constitutes an action of the state as *parens patriae*, plaintiff would be faced

with the fact that it is endeavoring to overthrow an Act of Congress. No such element was involved in the cases cited by the plaintiff.

But in MASSACHUSETTS v. MELLON, 262 U. S. 447 (1923), this court distinctly said (pp. 485, 486) that a State, as *parens patriae*, may not attack the constitutionality of an Act of Congress. As to such legislation, the United States and not the State is *parens patriae*.

X

The Questions Here Raised May Properly Be Disposed of in Another Case

The returns and briefs filed by the States of New York, Colorado and Montana call attention to the fact that there is now pending in the New York State Supreme Court, Albany County, an action in equity, entitled "HARRY GREENTHAL v. JOHN J. BENNETT, JR., as Attorney-General of the State of New York," which seeks to restrain the enforcement of both Ch. 26, L. 1933 of New York and the Act of Congress of Jan. 19, 1929 (Hawes-Cooper Act) 45 Stat. 1084, on the ground that both represent unconstitutional interferences with interstate commerce. It is stated that that case presents a real controversy, identical in effect with the bill of complaint herein, and which will probably be carried on appeal or writ of certiorari to this Court. Argument has been heard at special term, and decision is being awaited.

Whether or not that case will involve all of the issues which might arise as to various acts of the

numerous defendants in this case, we cannot say. Probably it will not. However, it will undoubtedly require a determination of the basic issues which Alabama seeks to raise here, namely, the constitutionality of the Hawes-Cooper Act and the general extent of the authority of the states to control the sale of convict made goods imported from other states.

If they desire to do so, the defendant states may file briefs as *amici curiae* when that case reaches this court, or they may await the result of that case, and if it determines the issues which would be involved in a test of their own statutes, will undoubtedly voluntarily abide by the result therein reached.

XI

Conclusion

Therefore we respectfully submit that Alabama should not be allowed to file its bill of complaint in this case.

Respectfully submitted,

WM. A. SCHNADER.
Attorney General of Pennsylvania.

HARRIS C. ARNOLD,
Deputy Attorney General of Pennsylvania.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1933

No. .... Original

IN EQUITY

STATE OF ALABAMA,

Plaintiff,

v.

STATE OF ARIZONA, et al.,

Defendants.

Supplemental Brief of the State of Wisconsin, One of the Defendants, On Motion For Leave to File Bill of Complaint

JAMES E. FINNEGAN,
Attorney General of Wisconsin,

J. E. MESSERSCHMIDT,
Assistant Attorney General of Wisconsin.

SYNOPSIS

Page

Although the name of the Attorney General of Wisconsin does not appear on the defendants' brief, still he fully agrees with said brief and accepts it as that of his State 1

This brief does not re-state or cover the points discussed in defendants' brief, but simply in addition to the Statutes of Wisconsin, which are cited, gives some observations of the case of Hammer v. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101..... 2

STATUTES OF WISCONSIN with reference to convict labor 2-7

State of Wisconsin will show that the only goods manufactured by convict labor which is sold in the open market is binder's twine and this is marked and labeled as prison made goods when sold in the State of Wisconsin, as well as when sold in other states..... 7

The ruling in Hammer v. Dagenhart, is not controlling in the instant case 7

The Hammer v. Dagenhart case is decided by a five to four opinion, should not be considered controlling and if the court would be of the opinion that it is controlling then we respectfully suggest that the question involved is worthy of reconsideration and of an original and fundamental investigation, as it appears now that neither Congress nor the states have the power to prohibit the transportation of convict made goods in interstate commerce. It is

Page

now apparent that this power should be in the hands of the people and that Congress needs the power in order to cope with the greater economic questions connected with interstate commerce.... 8-12

STATUTES INVOLVED

Wis. Stats.

Sec. 56.01 (1)..... 3
(2)..... 3
(3).....3-4
(4)..... 4
(5)..... 4

56.02 (1)..... 4
(2)..... 4
(3).....4-5

56.03..... 5

56.04 (1)..... 5
(2)..... 5

56.05 (1)..... 5
(2)..... 5

56.06 (1).....5-6
(2)..... 6
(3)..... 6
(4).....6-7
(5)..... 7

132.13 7

343.652.....2-3

CASES CITED

Page

Brooks v. United States, 267 U. S. 432.....12

Gibbons v. Ogden, 9 Wheat. 1, *9.....11

Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101.. .....2, 7, 8, 9, 12

Rahrer, In re, 140 U. S. 545..... 7

TEXTS

Cornell Law Quarterly, Vol. 18, page 477.....9, 12

U. S. C. A., Title 5, para. 367.....11

UNITED STATES CONSTITUTION

Art. I, sec. 8, subsec. (3).....10

II, 2 11

IV, 3 11

It would be a work of superogation to restate and cover the points made in the brief of the defendants, and it would be of no help to the court. We will, therefore, limit ourselves to giving the court information first, as to the statutes and practice in Wisconsin and second, some observations on the case of *Hammer v. Dagenhart*, 247 U. S. 251, 62 L. ed. 1101.

STATUTES OF WISCONSIN

"132.13. *Labels on prison-made goods.* All goods, wares and merchandise made by convict labor in any penitentiary, prison, reformatory or other establishment in which convict labor is employed in any state, except this state, and imported, brought or introduced into this state shall, before being exposed for sale, be branded, labeled or marked as herein provided, and shall not be exposed for sale in this state without such brand, label or mark. Such brand, label or mark shall contain at the head or top thereof the words 'convict-made,' followed by the year and name of the penitentiary, prison, reformatory or other establishment in which it was made, in plain English lettering, of the style and size known as great primer roman condensed capitals. The brand or mark shall in all cases, where the nature of the article will permit, be placed upon the same, and only where such branding or marking is impossible shall a lebal be used, and where a label is used it shall be in the form of a paper tag, which shall be attached by wire to each article, where the nature of the article will permit, and placed securely upon the box, crate or other covering in which such goods, wares or merchandise may be packed, shipped or exposed for sale. Said brand, mark or label shall be placed upon the outside of and upon the most conspicuous part of the finished article and its box, crate or covering."

"343.652. *Penalty for selling such goods, etc.* A person knowingly having in his possession for the purpose of sale or offering for sale any convict-made

goods, wares or merchandise manufactured in any state except this, without the brand, mark or label required by law, or who removes or defaces such brand, mark or label shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not less than one hundred dollars nor more than five hundred dollars."

"56.01. *Prison industries and products.* (1) The state board of control may establish and conduct various industries, and purchase machinery and raw materials, for the employment of prisoners in the state reformatory and state prison, in the manufacture of articles for the state and its municipalities, including motor vehicle license plates and highway signs and markers, and for sale, by contract or otherwise, to other states or political subdivisions thereof or to the United States government or in the open market; and shall fix the price of all articles produced as near the market price as possible; provided that no monumental article shall be manufactured and sold in the open market. In fixing the price of motor vehicle license plates and highway signs and markers to the state of Wisconsin or any subdivision thereof the value of labor of each prisoner employed at such work shall be calculated at the rate of one dollar and seventy-five cents per day, of which twenty-five cents may be allowed as pay to the prisoner so employed or as a benefit to his dependents.

"(2) The said board may lease or purchase land within the state for the employment of such prisoners at farm work, beds of limestone for the manufacture of fertilizer, and beds of rock for road-building material; and may employ such prisoners and construct temporary barracks for their custody and safe-keeping outside the pison inclosure.

"(3) Whenever the said board is prepared to furnish prison products, it shall give notice to the proper officials of the state and each county, or other municipality, of the kind or kinds of products that it is prepared to furnish; and on or before July first in

each year thereafter, the officials so notified shall report to said board estimates of the amounts of such prison products which they will require for the ensuing year.

"(4) The state, or county, or other municipality, receiving such notice shall not purchase, otherwise than from said board, any products of the kind or kinds specified in said notice, other than road-building material, except upon a permit issued by the said board; and any official who shall violate or participate in the violation of this subsection shall forfeit not to exceed one hundred dollars, for each such violation; but any party aggrieved by a refusal of such permit may appeal to the governor, who may order the granting of such permit, and such order shall be final and conclusive.

"(5) The said board shall include in its biennial report to the governor, a statement showing in detail the amount of each of the various articles produced in the prison industries, the disposition of these articles, the cost of the raw material purchased, the new machinery installed and the cost thereof, the land purchased or leased and the cost thereof, and the rates and total amount of wages paid or credited to prisoners pursuant to this section."

"56.02 *Binder twine plant at the state prison.* (1) The board of control shall, at a cost not exceeding the sums appropriated therefor, purchase, erect and maintain at the state prison the necessary buildings, machinery and equipment for the manufacture of binder twine, and shall operate such plant.

"(2) The warden of the state prison shall give an additional bond to the state of Wisconsin, in the penal sum of fifty thousand dollars, conditioned for the failthful performance of the additional duties devolving upon him in the operation of said binder twine plant, and to be approved by the governor.

"(3) The price of the binding twine and cordage manufactured in said plant shall be fixed from time to time by the board of control and the warden of the state prison. The product of said plant shall be sold

at such times and places, and in such manner as the said board and warden shall determine to be for the best interests of the state; but citizens of the state shall have the preference in purchasing said products."

"56.03 *Convict labor on the prison farm and on construction of public buildings.* The warden of the state prison may employ the convicts outside the prison yard in quarrying or getting stone from and cultivating the prison farm, or in doing any work necessary to be done in the prosecution of the regular business of the institution; and also away from the prison grounds in the construction of buildings being erected by the state. In all such cases the warden shall detail such force from the prison police as he shall deem necessary to watch and guard such convicts; and any such convict who escapes shall be deemed as having escaped from the prison proper."

"56.04 *Convict labor on highways.* (1) The board of control may employ inmates of the state prison in the construction and improvement of such roads and highways as the said board and the state highway commission may determine, in such manner and under such terms as may be agreed upon.

"(2) The board may purchase or lease such tools and machinery as said board and the state highway commission deem necessary for the purpose of carrying out the provisions of this section."

"56.05 *Prison farms.* (1) The commissioners of the public lands, the state conservation commission and the state board of control are authorized to select from the state forest reserves a quantity of land not to exceed five thousand acres to be converted into farms for the state prison.

"(2) After such selection has been made the board of control shall take possession of said lands and put them in a tillable condition by the employment of the labor of convicts in the state prison."

"56.06 *Leasing of convict labor.* (1) The state board of control is authorized to lease, from time to time, the labor of such portion of the prisoners confined in the state prison, together with such shop room, ma-

chinery and power as may be necessary for their proper employment, to such persons, for such purposes, upon such terms and conditions and for such length of time, not exceeding five years at any one time, as it shall deem most conducive to the interests of the state and the welfare of the prisoners.

"(2) Before entering into any such contract the board shall, by public advertisement, for at least four weeks in one newspaper published in each of the cities of Milwaukee and Chicago, and in the official state paper, invite sealed proposals for the hiring of such labor and the shop room, machinery and power. Such advertisements shall specify the time and place when and where such proposals will be opened and considered, and shall reserve the right to reject any or all bids.

"(3) Every such contract shall reserve to said board and to the warden and each and every of his subordinates full power and authority to prevent the demanding or imposition of unusual or severe labor or labor whereby the health or safety of the convicts may be impaired or jeopardized; and the said board may, from time to time, prescribe all needful rules for the government and conduct of all contractors, their overseers and agents in their relations to the convicts, and may require summary dismissal of any individual employed by any contractor in said prison whenever it shall appear that the presence or the conduct of such individual is prejudicial to the discipline of the prison or the welfare of the convicts.

"(4) Adequate security shall be exacted of all contractors for the faithful performance of all the provisions of the contract on their part to be performed, and the board of control shall use its utmost endeavors to have all the terms and conditions of said contract fully complied with on its part; but no contractor shall have or claim from the state of Wisconsin, the state board of control, the warden or from the prison or any of its funds any damages, whether by way of recoupment, setoff or otherwise, for or on account of the

failue or neglect of said board to furnish to such contractor the labor of the full number of convicts specified in its contract.

"(5) The state board of control may make all needful rules and regulations for the guidance of the warden in the execution of any contract made by it and may, whenever in its judgment it is impracticable to furnish the labor of convicts to any contractor, determine and cancel any contract, and thereupon, after six months' notice to such contractor, all obligations to said board under such contract shall cease and determine, and such contractor shall not have or be entitled to have any compensation, whether by way of damages, setoff, recoupment or otherwise, in consequence thereof."

We will be able to show that in Wisconsin the only prison made goods that are made by convicts and sold in the open market is binders' twine and these are all marked and labeled as prison made goods when sold in the state of Wisconsin as well as when sold in other states. It will be noted that sec. 132.13, Wis. Stats. which requires labels on prison made goods made by convict labor in states other than Wisconsin, is therefore in actual practice not a discrimination against convict labor of other states although it would appear so by the wording of the statute.

HAMMER V. DAGENHART, 247 U. S. 251, 62 L. ED. 1101

We believe that the instant case is not effected by the decision in the case of *Hammer v. Dagenhart*, 247 U. S. 251, 62 L. Ed. 1101. The ruling in the case of *In re Rahrer*, 140 U. S. 545 and subsequently adhered to, in which it was held that Congress may pass a valid law divesting goods of their interstate character upon arrival in a state in such manner as to subject those goods immediately to the operation of the laws of the state whether still contained in the original

packages or not, is all that is required in order to sustain the Hawes-Cooper Act. Counsel for plaintiff however insists that the ruling in the *Dagenhart case* must necessarily rule this case for the reason that we have here an article of commerce which is not of an exceptional nature.

Not only has it been pointed out in the defendant's brief already that convict goods should be held to be of an exceptional nature, but it should be pointed out also that the federal child labor law was held unconstitutional in the *Hammer v. Dagenhart* case by a majority of five justices against the vigorous dissent of four justices. It is not to be assumed that the principals of that case, if hereinafter maintained, will be further extended. The dissenting opinion in that case by Mr. Justice Holmes seems to us to present the better law. Evil may be found which needs correction in the use to which articles are put or in the manner of their production, so that Congress may well prohibit the interstate transportation of goods when such interstate transportation is an aid to an evil in the sale or an evil in the production. The majority opinion in that case held that the authority given to Congress was not to control the state in the exercise of their police power over local trade and manufacture. The answer to this by Chief Justice Holmes is conclusive. He said:

> "The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at

her boundaries the State encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. * * * The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command."

Hammer v. Dagenhart, 247 U. S. 251 at 281.

The serious part in the matter is that this case takes from Congress certain powers that we believe were definitely delegated to it by the constitution. A power that the states can no longer exercise and is sorely needed at the present time when the development of interstate commerce or big business is making great strides. To adequately cope with the problems confronting the governments of today this power to regulate commerce is needed. Mr. Edward S. Corwin, in his criticism of this case in an article in the Cornell Law Quarterly, Vol. 18, page 477, uses the following significant language on page 498:

"In other words, *Hammer v. Dagenhart* denies to Congress power over commerce which originally belonged to the individual states of the Union! As a matter of fact, when read along with certain decisions in which the 'commerce' clause has been applied as a restraint on state power, it is found to do something even more remarkable. By the plain logic of the cases today neither Congress nor the states, nor both together, can stop interstate commerce in the products of child labor. Such products being 'good articles of commerce,' no state can prohibit their entry from another state nor their sale in the original package within its boundaries, since to do so would be to invade the field of Congress's power to regulate interstate commerce. But Congress, nevertheless, we are now informed, may not exercise the power so solicitously

guaranteed its exclusive control, since to do so would be to invade the field of power reserved to the states. So the states, which, without challenge, originally possessed this power, have now lost it by virtue of having delegated it to Congress, but Congress has never received it! 'Dual Federalism' thus becomes *triple* federalism—inserted between the realm of the National Government and that of the state is one of no-government—a governmental vacuum, a political 'no-man's land.' "

The power given to Congress under Art. I, sec. 8, subsec. (3) of the United States Constitution reads thus:

> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Counsel in his brief quotes extensively, definitions from dictionaries covering three hundred years, as to the meaning of "regulate" and comes to the conclusion that in none of them is there any suggestion of prohibition on the part of the government. Still the word "regulate" is used when referring to foreign commerce as well as when referring to interstate commerce in the same sentence, and it certainly cannot under any rule of construction be given one meaning as to one clause and a different meaning as to another clause.

This court has held that regulation may sometimes include prohibition, and in foreign commerce it has universally been accepted as covering prohibition. In U. S. C. A., Title 19, para. 140 we find a federal statute which provides:

> "All goods, wares, articles, and merchandise manufactured wholly or in part in any foreign country by convict labor shall not be entitled to entry at any of the ports of the United States, and the importation thereof is prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this

provision. (Sept. 21, 1922, c. 356, Title III, sec. 307, 42 Stat. 937.)"

In U. S. C. A., Title 5, para. 367, we find the following:

"No contract shall be entered into by the Post Office Department for purchase of material or supplies to be manufactured by convict labor. (Apr. 28, 1904, c. 1759, sec. 1, 33 Stat. 435.)"

The power to do this is not found in the provisions of the constitution under the treaty-making power (Art. II, sec. 2, U. S. Const.) nor under the power to make rules and regulations respecting the territory of the United States (Art. IV, sec. 3, U. S. Const.) as suggested by counsel for plaintiff on page 46 of his brief. These statutes have been on the federal statute book for years. They can only be justified on the theory that the word "regulate" in the constitution referring to foreign commerce includes the power to prohibit.

As we turn to *Gibbons v. Ogden*, 9 Wheat. 1, *9, the first case under the commerce clause to reach the constitution, the language used by Justice Marshall is appropos in arriving at the real meaning of the commerce clause of the constitution. He said:

"It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found

in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

Under this statement of Marshall's, it seems clear that, on the question of whether interstate commerce should be prohibited, was a question for Congress to determine subject only to its political responsibility at the polls. We believe that Congress needs this power now in order to cope with the great questions that need solving in regulating interstate commerce of the country. This court has said in the case of *Brooks v. United States*, 267 U. S. 432, that Congress may exercise the police power for the benefit of the public within the field of interstate commerce. Congress needs this power also and we believe it was delegated to it by the constitution as an incident with the power to regulate interstate commerce.

May we suggest if the court should be of the opinion that the case of *Hammer v. Dagenhart*, 247 U. S. 251, 62 L. ed. 1101 is in any way involved in the decision of this case that the question is worthy of re-consideration and of an original and fundamental investigation, and for such special purpose we cite to the court the article by Edward S. Corwin in Vol. 18 of the Cornell Law Quarterly, page 477.

Respectfully submitted,

JAMES E. FINNEGAN,
Attorney General of Wisconsin,

J. E. MESSERSCHMIDT,
Assistant Attorney General of Wisconsin.

SUPREME COURT OF THE UNITED STATES.

No. —, Original.—October Term, 1933.

State of Alabama, Plaintiff,
vs.
State of Arizona, et al.
} In Equity.

[February 5, 1934.]

Mr. Justice Butler delivered the opinion of the Court.

For the purpose of invoking original jurisdiction as "to Controversies between two or more States" (Const., Art. III, § 2) Alabama lodged with the clerk and applied for leave to file a complaint against 19 States praying that the court adjudge invalid, because in violation of the commerce clause of the Federal Constitution, statutes by them respectively enacted to regulate or prohibit sales of articles produced by convict labor and an Act of Congress approved January 19, 1929, 45 Stat. 1084, effective January 19, 1934, to divest in certain cases such products of their interstate character. Responding to our orders to show cause why leave should not be granted, 17 of the States submitted returns suggesting that the complaint is multifarious and fails to allege facts sufficient to entitle Alabama to any relief. At the hearing upon the questions so raised, counsel for Alabama obtained leave to, and on a later day did, submit an amendment eliminating 14 States including those that merely regulate and some that prohibit sales of convict made goods, leaving only Arizona, Idaho, Montana, New York and Pennsylvania.

Each of the assailed state statutes, while not in all respects the same as the others, forbids the sale upon the open market of any goods produced wholly or in part by convicts of other States and prescribes penalties for violation. The Act of Congress declares that, with exceptions which need not be specified here, goods produced by convict labor and transported into any State shall be subject to the laws of that State to the same extent and in the same manner as if there produced.

The substance of the complaint follows. Alabama's prison population averages about 5,500 and in connection with its prisons it has agricultural lands, cotton mills and a shirt factory. About

1,050 inmates do farm work for the production of cotton and potatoes, and about 1,250 operate spindles and make shirts. In 1927 the State entered into a contract with a manufacturing company pursuant to which it sold the latter cotton goods made in its mills and, for hire at the rate of 75 cents per dozen shirts made, furnished convict labor to be employed in the prison factory. The contract expired March 31, 1933, and, the company having declined to renew or extend it, the parties agreed that during the ensuing quarter the State would sell the company prison-made goods for 5 cents a yard and furnish the convict labor for 54 cents per dozen shirts.

While the contract was in force the company sold some of the convict-made products in each of the 19 States originally named as defendants. In round figures, sales amounted annually to $347,000 of which it received for the goods sold in Arizona $1,000, Idaho $10,000, Montana $10,000, New York $30,000, Pennsylvania $25,000. For the material and labor furnished by it Alabama received the equivalent of 30 per cent. of the amounts for which the company sold the goods. Because of the Act of Congress and state statutes in question Alabama is unable to make any "firm agreement" for the sale of its prison-made cotton goods or for the employment of its convicts. In the second quarter of 1933 it received for labor $11,500 less than was paid it in the preceding quarter. The lower rate of compensation will continue during the rest of 1933. And enforcement of the statutes in question will prevent Alabama from selling in defendant States potatoes produced by the labor of its convicts.

Alabama's investment in the cotton mills and shirt factory exceeds $300,000 and will be valueless as a result of its inability to find an employer for its convict labor and a market for its prison-made goods. The cost of maintaining unemployed convicts will be about $550,000 annually. Without employment convicts cannot be treated appropriately for their rehabilitation and the promotion of the good order and welfare of the State. The very existence of the assailed enactments is sufficient to bring about the unemployment which will continue unless their enforcement is enjoined.

If Alabama is compelled to provide other employment, it will have to expend about $1,000,000 for the construction of plants for the manufacture of things to be used by the inmates of its elee-

monynary institutions and in and about other state activities. As presently employed its prisoners are divided into night and day shifts so as to avoid overcrowding of the prisons. And, if the State does not provide other industrial activities it will have to expend about $100,000 for additional space to house its convicts.

1. There is no test or rule of general application by which to determine whether a complaint in equity is multifarious. That question is to be decided by the court in the exercise of sound discretion having regard to the facts alleged, circumstances disclosed and the character of the relief sought. *Oliver* v. *Piatt*, 3 How. 333, 411. *Nelson* v. *Hill*, 5 How. 127, 132. *Shields* v. *Thomas*, 18 How. 253, 259. *Fitch* v. *Creighton*, 24 How. 159, 163-164. *Brown* v. *Guarantee Trust Co.*, 128 U. S. 403, 410. Unless necessary for the prompt, convenient and effective administration of justice, a suit by one State against several States to set aside a statute of each is properly to be regarded as multifarious. There has been suggested no reason to sustain Alabama's complaint, as it stood before amendment, against the objection of misjoinder of parties defendant and of causes of action. Cf. *Hale* v. *Allinson*, 188 U. S. 56, 74.

The amendment of the bill serves merely to obviate objections that are based on dissimilarity of the state enactments. It is not shown that the joinder of five States is necessary to avoid a multiplicity of suits or that it will substantially serve the convenience of Alabama or of the court. Alabama does not claim concert of action on the part of the defendants or that they are jointly liable in respect of any matter referred to in the bill. The enforcement of the statutes attacked would prohibit the sale of Alabama's prison products in the five States named. If one is repugnant to the commerce clause, all transgress. Alabama cites *Bitterman* v. *Louisville & Nashville R. R.*, 207 U. S. 205. Considerations of convenience that in suits between private parties reasonably may justify exercise of discretion in support of such joinders have no bearing in a case such as this. If, in a suit brought by Alabama against one of these States, this court should hold the assailed statute invalid and enjoin its enforcement, the decision would be authoritative and controlling as a precedent in all courts, state and federal. Presumably no other State would attempt on similar facts to enforce a like measure, and Alabama would have no occasion to invoke our jurisdiction further. The amended bill is multifarious.

2. This court may not be called on to give advisory opinions or to pronounce declaratory judgments. *Muskrat* v. *United States*, 219 U. S. 346. *Willing* v. *Chicago Auditorium*, 277 U. S. 274, 288, and cases cited. *Nashville, C. & St. L. Ry.* v. *Williams*, 288 U. S. 249, 261-262. Its jurisdiction in respect of controversies between States will not be exerted in the absence of absolute necessity. *Louisiana* v. *Texas*, 176 U. S. 1, 15. A State asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor. Our decisions definitely establish that not every matter of sufficient moment to warrant resort to equity by one person against another would justify an interference by this court with the action of a State. *Missouri* v. *Illinois*, 200 U. S. 496, 520-521. *New York* v. *New Jersey*, 256 U. S. 296, 309. *North Dakota* v. *Minnesota*, 263 U. S. 365, 374. Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent. *Missouri* v. *Illinois*, *supra*, 521. In the absence of specific showing to the contrary, it will be presumed that no State will attempt to enforce an unconstitutional enactment to the detriment of another. Cf. *Ex parte La Prade*, 289 U. S. 444, 458. The burden upon the plaintiff State fully and clearly to establish all essential elements of its case is greater than that generally required to be borne by one seeking an injunction in a suit between private parties. *Connecticut* v. *Massachusetts*, 282 U. S. 660, 669.

Plainly the amended bill does not meet the requirements that reasonably should be imposed upon the applicant. It fails to show that Alabama has any agreement with any defendant or that there is any direct issue between them or that the validity of the statutes in question and Alabama's assertion of right may not, or indeed will not, speedily and conveniently be tested by the contracting company, that apparently is directly concerned, or by a seller of such goods. Cf *Louisiana* v. *Texas*, *supra*, 18, 22. There is no allegation that an adequate market for the goods in question may not be found outside the five States named. The facts alleged are not sufficient to warrant a finding that the enforcement of the statutes of any defendant would cause Alabama to suffer great loss or any serious injury. If filed, the bill would have to be dismissed for want of equity. *Florida* v. *Mellon*, 273 U. S. 12.

Leave denied.

Mr. Justice STONE concurs in the result.